SIMULACRA AND NOTARIZATION:
THE LEGAL HISTORY OF RON

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Notarization has been a formal part of real estate conveyancing for most of American history. In most of the United States, a deed or mortgage is not eligible for recording in the land records unless the signatures on the document have been notarized. And an unrecorded deed or mortgage does not provide constructive notice to third parties, leaving the buyer or lender exposed to a potentially catastrophic loss. In 2011, the Commonwealth of Virginia passed the first-ever law allowing notaries to operate online, thereby "splitting the atom" of notarization. When this statute became effective in mid-2012, it unleashed a cascade of novel legal issues that simmered largely unnoticed beneath the surface of the world's largest asset class for nearly eight years. The COVID-19 Pandemic brought these unanswered questions to the forefront, swamping an overwhelmed real estate economy that was unprepared for an overnight digital transformation after decades of underinvestment. This is the story of how old laws, new technologies, dyed-in-the-wool business practices, a legal culture of risk aversion, and a one-micron virus plowed headlong into centuries of black-letter Anglo-American real estate law.

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"It is no longer a question of imitation, nor duplication, nor even parody. It is a question of substituting the signs of the real for the real."

--Jean Baudrillard [1]

Notarizations are a part of daily life as a real estate lawyer. If you practice dirt law, you know that you need a notary handy. Perhaps your office assistant is a notary. Perhaps your paralegal is a notary. Perhaps you are a notary, whether having been commissioned yourself, or *ex officio* as a result of being a member of the bar in your state(s) of practice. Notarizations are as much a staple of a real estate lawyer's office as are pens and paper.

But how much do you think about how notarization works? The likely answer is, "not very much." You probably don't think about how your ball point pen works, either. Before the spring of 2020, notarizations were "just there." You expect that a pen will work when you need it, and you expect that a notary will too. Notarizations were probably not worth thinking about in your daily life.

But believe it or not, a few people have been thinking *a lot* about notarization since 2011. That was the year that notarization changed dramatically, when the Commonwealth of Virginia passed a law allowing its notaries to act through the internet, creating what became known as "remote online notarization" or "RON." Later, a number of RON spinoffs arose with varying terminologies,[2] and in this paper we will mainly refer to them collectively as "remote notarization." Whether this transformational change in notarization turns out for the better or for the worse remains to be seen; history is still being written at the same time as is this paper.

Your authors have been eyeball-deep in the rapidly changing world of notarization since the Virginia law went into effect in July of 2012. This paper represents our attempt to

[1] JEAN BAUDRILLARD, SIMULACRA AND SIMULATION 2 (Sheila Faria Glaser trans. 1994).
[2] American Land Title Association, *Notarization Types and Terminology*, https://www.alta.org/media/pdf/advocacy/alta-notarization-types-and-terminology.pdf (last visited Aug. 30, 2020).

consolidate that complex legal history into one place. Even at this length, we are only able to provide a basic overview of the field; many of the subjects treated below deserve full-length papers in and of themselves. And while we certainly have a perspective on the various forms of remote notarization, and while we certainly do offer our perspective, in this paper we very much do our best to present the fundamental issues as objectively and fairly as any two people can do.

To that end, some of the things we have to say in this paper will be uncomfortable reading. They certainly were uncomfortable writing. We know that some of what we say here could well be used to attack real estate transactions that closed using various forms of remote notarization—which is the exact opposite of what we transactional real estate lawyers want to see. But there is a greater purpose to the candid discussion we offer in this paper.

The concept of remote notarization poses difficult public policy questions that need to be statutorily addressed, both at a state level and at a federal level. Reducing the difficult subject of remote notarization to simplistic talking points and sweeping the hard issues under the rug does not serve the genuine interests of anyone in the real estate economy. Lack of clarity engenders confusion, which increases risk, which creates a drag on the real estate economy. The longer we wait to candidly face up to these hard issues, the more the risk grows, right under our collective noses. We are not alarmists, but we see eerie parallels to the legal thicket that sprang up around the Great Recession's foreclosure crisis, where unanswered questions about similar issues gave rise to a nationwide tsunami of litigation, all of it having unclear paperwork at its core. No one wants to see a redux of anything like the "MERS cases"[3] or the "robosigning cases."[4]

[3] *E.g.*, *Montgomery County, Pa. v. MERSCORP, Inc.*, 795 F.3d 372 (3d. Cir. 2015) (illustrating but one example of the court-choking litigation hairball that arose from sloppy mortgage paperwork practices in the mid-2000s). Our Lexis search for the phrase "MERS mortgage" generated more than 10,000 results.

If we want to be sure that we stay clear from similar rocky shoals this time around, we need to make some hard public policy decisions based on candid discussions about the concept of remote notarization, and we need to do so quickly. We need to face some uncomfortable facts. We need to be able to sift through the intertwined American histories of notarization and real estate. We need to sort what is real from what is merely the signs of the real.

In his landmark work *Simulacra and Simulation*, French sociologist Jean Baudrillard discusses the concept of the "simulacrum"—the copy without an original.[5] His paradigm example is Disneyland. As Baudrillard writes, Disneyland is an idealized version of 1950s America, a world whose original no longer exists, but whose copy persists.[6] Now there are actually multiple copies of it (Disneyland, Disney World, Disney Tokyo, Disney Paris, etc.), all of them without an original. As Baudrillard puts it: "Disneyland is a perfect model of all the entangled orders of simulacra."[7]

Today, notarization stands at a crossroads. As we discuss in the pages below, notarization needs to be sensibly updated in order to fit into the 21st-century reality of electronic-enabled real estate transactions. If not, society risks allowing notarization to become an empty electronic ritual, a copy that persists even though its original meaning is long gone, another string in the entangled orders of simulacra created as real estate rapidly digitizes. These issues are nuanced and difficult. So "fasten your seatbelt, Dorothy, because Kansas is going bye-bye."[8]

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[4] *E.g.*, *Martins v. BAC Home Loans Serv., L.P.*, 722 F.3d 249 (5th Cir. 2013) (illustrating the "show-me-the-note" and "split-the-note" theories arising out of the aforementioned sloppy mortgage paperwork practices in the mid-2000s).

[5] *See, e.g.*, Dino Franco Felluga, *Introductory Guide to Critical Theory*, Definition: Simulacrum, https://cla.purdue.edu/academic/english/theory/postmodernism/terms/simulacrum.html (last visited Aug. 30, 2020).

[6] Baudrillard, *supra* n.1, at 12 ("Disneyland is presented as imaginary in order to make us believe that the rest is real, whereas all of Los Angeles and the America that surrounds it are no longer real . . . .").

[7] *Id.*

[8] THE MATRIX (Warner Bros. 1999).

I. FROM MEDIEVAL TIMES TO MANIFEST DESTINY

"Go West, young man, go West and grow up with the country."
--Horace Greeley [9]

Considered as a whole, real property is the largest asset class in the world.[10] United States real property represents an eye-popping proportion of our national wealth.[11] Indeed, the story of the United States is in many ways a story of real estate, from European colonization to westward expansion.[12] Some of the foundational events in American history are, in fact, real estate transactions: the acquisition of the Northwest Territories; the Louisiana Purchase; the Alaska Purchase. Today, real estate remains the most common method by which ordinary Americans build wealth.[13] To that end, in 2019 alone there were at least 5.3 million real estate transactions in the United States.[14] And nearly every one of them required a notary.

Notarizations are to real estate transactions what twenty-five cent parts are to multi-million-dollar racecars: necessary but overlooked components that no one pays any attention to until they break.[15] The ministerial act of notarization has by happenstance assumed a critical role in the closing of almost any real estate transaction. Everything from the largest billion-dollar

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[9] The phrase is attributed to Horace Greeley, but may have many possible originators. WIKIPEDIA, *Go West, Young Man,* https://en.wikipedia.org/wiki/Go_West,_young_man (last visited Aug. 30, 2020).
[10] *E.g.*, *A History – How Housing Became the World's Largest Asset Class*, THE ECONOMIST, Jan. 16, 2020, https://www.economist.com/special-report/2020/01/16/how-housing-became-the-worlds-biggest-asset-class (last visited Aug. 30, 2020).
[11] JEFFREY M. STUPAK, INTRODUCTION TO U.S. ECONOMY: HOUSING MARKET, CONG. RES. SERV. IF11327 (Oct. 2, 2019) ("Taken together, spending within the housing market accounted for nearly 15% of GDP in 2018"), *available at* https://fas.org/sgp/crs/misc/IF11327.pdf (last visited Aug. 30, 2020).
[12] We recognize that much of this expansionist history is presently undergoing cultural re-examination. Our purpose here is simply to acknowledge as historical fact the intrinsically intertwined histories of American history and real property.
[13] Stupak, *supra* n.11 (Figure 1, illustrating that home value typically represents around 1/3 of all U.S. household net worth).
[14] Quick Real Estate Statistics, NAT'L ASS'N OF REALTORS (July 17, 2020), https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics (last visited Aug. 30, 2020). And this number only represents residential transactions.
[15] Sam Smith, *The Most Wonderfully Bizarre Cars Ever to Race LeMans*, WIRED, June 12, 2015 ("You might go home broken and six figures poorer, your car in tatters because . . . a 25-cent part failed."), *available at* https://www.wired.com/2015/06/the-most-wonderfully-bizarre-cars-ever-to-race-the-24-hours-of-le-mans/ (last visited Aug. 30, 2020).

megadeal to the cheapest vacant parcel transfer hinges upon a notarization. The reason is recording. Not recording in the sense of capturing an event in real time via some type of device—we'll get to that here in a bit. But rather, the need to give a document to someone commonly called a "county recorder," who "records" the document in a public office.

As every first-year law student learns, a deed or mortgage to a hypothetical piece of property (uniformly, "Blackacre") is valid as between the parties thereto when it is executed, delivered, and accepted.[16] But that three-part formula only binds the parties to the document—the rights of third parties are unaffected. Unless, that is, those third parties have *notice* of the transaction.[17]

Notice in the United States comes in one of three ways: actual, inquiry, and constructive.[18] Rarely will a wholly unrelated third party have actual notice of a conveyance or mortgage involving Blackacre.[19] A third party may be placed on inquiry notice when (s)he "should have known" about the transaction through obvious and apparent circumstances,[20] but this too is a rare set of facts. In the United States, we most often bind third parties by means of "constructive notice" arising from the recording of the document evidencing the transaction in the land records,[21] which are maintained by various government officials whose precise name and title vary depending on the jurisdiction in question. But they are commonly referred to using the generic moniker "county recorders."

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[16] 3 AMERICAN LAW OF PROPERTY §§ 12.64-12.71 (1952); 14 POWELL ON REAL PROPERTY § 81A.04[2] (2020).
[17] 4 AMERICAN LAW OF PROPERTY § 17.10 *et seq.* (1952); 14 POWELL ON REAL PROPERTY § 82.01[3] (2020).
[18] JOYCE PALOMAR, PATTON & PALOMAR ON LAND TITLES § 12, at 58 (3d ed. 2003) ("The notice that will prevent a purchaser from claiming protection under a notice or race-notice recording act may be actual notice, constructive notice, or 'inquiry notice.'").
[19] *Cf. id.* at 58-60 ("Actual notice may be in the form of actual knowledge or express information communicated directly to the purchaser or her agent.").
[20] *Id.* at 71 ("[A] purchaser takes title subject to an of the rights of the occupier of which she would have learned by making a reasonable inquiry.").
[21] *See id.* at 76 ("Title attorneys and examiners' own concern is notice that will be imputed by the public records and the inquiries reasonably suggested thereby.").

This legal regime arises out of what are called the "recording acts" in each state.[22] Regardless of whether a state's recording act adheres to the pure "notice" approach, the "race-notice" approach, or the "race" approach, the rights of third parties to claim an interest in Blackacre contrary to that represented by the deed or mortgage in question are, as a general matter, cut off once the document is recorded in the land records.[23] Recording is therefore a critical component of any real estate transaction. No prudent buyer or lender will part with funds (and no prudent title insurer will provide coverage) unless it is confident that the document evidencing the interest in Blackacre has been or will soon be "recorded." As we discuss below, the origins of this real property recording system are inextricably intertwined into the history of notarization in the United States, which is in turn welded to the westward expansion of Anglo-American culture over the course of three centuries.

A. Origins of the Recording Acts

The principal features of the uniquely American[24] recording system took their current shape by 1640 at the latest, when the Massachusetts Bay Colony enacted an ordinance that required every conveyance of land to be acknowledged before a public officer before it was entitled to be recorded, *in whole*, in the land records.[25] The antecedents of this system are murky,

[22] 4 AMERICAN LAW OF PROPERTY pt. 17, ch. 2 (1952); 14 POWELL ON REAL PROPERTY ch. 82 (2020).
[23] 4 AMERICAN LAW OF PROPERTY § 17.5 (1952); 14 POWELL ON REAL PROPERTY § 82.02[1][a]–[c] (2020).
[24] The modern registration English system is vastly different from, and has origins unrelated to, our recording system and developed some three centuries later. On the English system, *see* ROBERT MEGARRY & WILLIAM WADE, THE LAW OF REAL PROPERTY 129–34, 146-256 (8th ed. 2012); and E.H. BURN & J. CARTWRIGHT, CHESHIRE AND BURN'S MODERN LAW OF REAL PROPERTY 131–46, 1071–1122 (18th ed. 2011).
[25] Joseph H. Beale, Jr., *The Origin of the System of Recording Deeds in America*, 19 THE GREEN BAG 335 (1907); George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U.L. REV. 281 (1941).

but scholars have traced its elements to local manorial and borough practices in medieval England.[26]

In addition, some have pointed to the influence of the Statute of Enrollments of 1536.[27] Through this law, which was a corollary to the more famous and important Statute of Uses,[28] the Crown required that all deeds of bargain and sale to lands be "inrolled" in a court office in Westminster (or certain satellite locations) within six months, or that they be voided. The purpose of the Statute of Uses was to convey to the beneficiary (*cestui que use*) the legal title to any property held in use (the forerunner of the modern trust) so that Henry VIII could collect the feudal incidents (*i.e.*, taxes) owed to the Crown upon the alienation or descent of property. An unanticipated side-effect of the Statute of Uses was to create a new method of conveyancing: whereas previously a bargain and sale merely created a use recognized in equity but not law, the Statute of Uses "executed" the use and vested legal title in the purchaser. And because bargains and sales of land did not need to be in writing (before the Statute of Frauds of 1677) and could be made through secret oral agreements, the Crown had no way to identify and collect the taxes

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[26] As discussed below, although it is often asserted that the origin of the American recording system lies in the Statute of Enrollments, its influence can only have been slight and indirect. The seminal article was by George Haskins, who shows that under town and borough custom in many places in England there was recording (of entire instruments) after acknowledgment in the Middle Ages onward. A similar antecedent might have been copyhold tenure, a form of ownership dating to the Middle Ages in which the transfer of manorial lands was recorded by entries in the local court's rolls; the villein tenant was said to hold title "by copy of the court roll," which was his sole evidence of title. The Statute of Enrollments was by contrast quite limited. It applied solely to freeholds, while the Plymouth and Massachusetts colonists were more likely owners of other types of tenure; and it only covered bargains and sales instead of constituting an attempt to create a general system of land registration. Haskins, *Beginnings*, *supra* n.25, at 296–302; P.H. Marshall, *A Historical Sketch of the American Recording Acts*, 4 CLEV.-MARSHALL L. REV. 56, 62–65 (1955); 4 AMERICAN LAW OF PROPERTY § 17.5 (1952).

[27] 27 Henry VIII, c. 16 (1536). *See*, *e.g.*, PALOMAR, *supra* n.18, § 6, at 27 ("Though . . . the English Statute of Enrollments was never considered part of the American common law, it quite probably was the pattern for our earliest statute on the subject, the Act of October 7, 1640, adopted by Massachusetts Bay Colony." (internal footnotes omitted)); *contra* 11 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 92.02 ("The English Statute of Enrollments probably did not directly influence the early Massachusetts Recording Act. The wording of the Statute differs substantially from that of the 1640 Massachusetts Bay Colony Ordinance."). But on the influence of the Statute on later colonial recording acts, *see* Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, Part I*, 93 U. PENN. L. REV. 125, 140–42 (1944).

[28] 27 Henry VIII, c. 10 (1536).

newly due to it. Therefore, the Statute of Enrollments was enacted a few months later to force all such "executed" uses to be made in writing, under seal, and publicly disclosed through enrollment.[29] In short, the Statute of Enrollments was not meant to solve some conveyancing problem from the perspective of the contracting parties, but rather to outlaw "clandestine conveyances" of which the Crown would not be aware.[30]

Because the purpose of the Statute of Enrollments was simply to log for the Crown the fact that a transaction had occurred, the original recording books in the halls of Westminster contained minimal information—only what was necessary to evidence the existence of an instrument. These original recording books were more like a merchant's ledgers than what now exists in counties across the United States today. The Statute of Enrollments was also soon a dead letter because it was evaded by a new method of conveyancing, the lease and release, which did not require enrollment.[31]

Nonetheless, when the English colonists first landed in Massachusetts in the early 1600s, they brought with them the idea that real estate conveyances should somehow be registered in a

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[29] A.W. BRIAN SIMPSON, A HISTORY OF THE LAND LAW 182–90 (2d ed. 1986); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 216–20, 223–25 (2d. ed. 1981); CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 226–29 (3d ed. 2002).

[30] In other words, the common reference in modern textbooks to the problem of "secret conveyances" was a problem created by Henry VIII in the Statute of Uses itself. By "executing" any use that arose, he effectively created a new method of conveyancing via bargain and sale (including through a simple deed). This had never been possible before. No more livery of seisin was required, and with conveyance of title it was suddenly impossible to figure out who the *legal title holder* was, not just the equitable owner. The Statute of Enrollments was needed to plug a gap created by the Statute of Uses.

[31] The Statute of Enrollments only applied to "any estate of inheritance or freehold," 27 Henry VIII, c. 16, which meant that a term of years was not required to be enrolled. Because the Statute of Uses "executed" a lease (creating a legal estate without the lessee's entering), and because a simple deed could then release the lessor's reversionary interest to the lessee, a conveyance of a fee simple could thus be accomplished that avoided the requirement for enrollment. MILSOM, *supra* n.29, at 224–25. The leading case is *Lutwich v. Mitton*, Cro. Jac. 604, 79 Eng. Rep. 516 (1620). The lease and release was the most common method of conveyance in England until 1845. In America, it was frequently used in New York until it was held that the Statute of Enrollments was not part of the received common law in *Jackson ex dem. Trowbridge v. Dunsbaugh*, 1 Johns.Cas. 91, 97 (N.Y. 1799) ("The statute of enrolments was never considered as extending to this country, but has always been deemed local, on account of its reference to the courts of *Westminster,* and to certain officers unknown to us." (emphasis in original)). *See* ROBERT LUDLOW FOWLER, THE REAL PROPERTY LAW OF THE STATE OF NEW YORK 827 (1909).

public office. But in these far-flung Colonies, isolated as they were from the courts of England, the purpose of recording land transactions with the government was not to identify taxpayers or collect taxes. Instead, the governmental recording offices were a way of maintaining social control through regulation and public disclosure of the sale of the colony's lands. They also helped to avoid disputes between persons who claimed competing interests in these lands of the New World. In addition, the precariousness of written documents in a frontier society elevated the importance of public safeguarding and preserving the contents of important legal records in a central repository.[32] These goals required more than simply a line item in a registry book, as it was necessary to know exactly *what* land was purportedly conveyed from one person to another. Thus arose the uniquely American custom of recording *entire copies of conveyancing instruments* in the county land records, a practice with some antecedents in England[33] but which became an entrenched practice in the American colonies over the course of the 17th century.

B. Domesticating Notaries

As noted above, another early feature of the American recording acts was the requirement for deeds and other instruments to be acknowledged before a public officer as a condition precedent for recording. The earliest known example of this requirement was an ordinance passed by the Plymouth Colony in 1636, which required:

[32] Haskins, *Beginnings*, *supra* n.25, at 299; 4 AMERICAN LAW OF PROPERTY § 17.5 (1952).
[33] For example, the fine and common recovery were two methods of conveyance through collusive lawsuits that reduced all the terms of the conveyance to a court record. Haskins, *Beginnings*, *supra* n.25, at 293–95. On these methods of conveyancing generally, which were sparingly used in American history and were abolished in England by the Fines and Recoveries Act of 1833, 3 & 4 Will. 4, c. 74, *see* SIMPSON, A HISTORY, *supra* n.29, at 119–37; MOYNIHAN & KURTZ, INTRODUCTION, *supra* n.29, at 206–07.

> [A]ll sales [,] exchanges [,] giftes [,] mor[t]gages [,] leases or other Conveyances of howses & lands the sale to be acknowledged before the Governor or any one of the Assistants & committed to publick Record and the fees to be payd.[34]

Immediately notable is that the grantor's acknowledgment was to be made before the colony's governor or one of his assistants, in other words the leading public officials, which was perhaps natural to do in a relatively small and geographically compact community where the sale of lands to outsiders was strictly regulated. The purpose of an acknowledgment is likewise already evident at these early times: it was to provide evidence of authenticity and validity of the deed, including the voluntariness of the conveyance and that it was in performance of a fully performed contract. In some of the earliest recorded deeds, we see the grantor acknowledge having been "fuly payed" for a conveyance or having conveyed "for an[d] in consideration of the summe" specified.[35] From Plymouth, the requirement of an acknowledgment spread to Massachusetts Bay (1640) and thence to other American colonies. It has continued in force to this day.

The origins of acknowledgments may likewise be traced to English town or borough recording systems, where the custom was widespread from at least the Tudor era.[36] In London, for example, William Bohun's celebrated *Priviliga Londini* (1702) states that "the Persons that sealed the Deed must go before the Lord Maior, or the Recorder, and one Alderman, and make Acknowledgment that the same is their Act and Deed"; and, upon receiving the testimony of the

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[34] Quoted in Beale, *The Origin*, *supra* n.25, at 336; Haskins, *Beginnings*, *supra* n.25, at 285; and 4 AMERICAN LAW OF PROPERTY § 17.4.

[35] Haskins, *Beginnings*, *supra* n.25, at 286.

[36] *Id.* at 296–97. Other possible influences for the origins of the requirement for an acknowledgment include Holland, where the Pilgrims spent time before coming to the New World, and English manorial courts, where copyholders made acknowledgments. *Id.* at 290–91 (citing a 1529 statute in Holland), 298; Marshall, *A Historical Sketch*, *supra* n.26, at 59–60, 65. The Statute of Enrollments also made provision for instruments to be "indented before" the enrolling officers, but this statute could only have been an indirect influence on American practice. 1 CORP. JUR., ACKNOWLEDGMENTS § 2 (1914) ("It is probable, however, that the earliest legislation on the subject [in the American colonies] was merely a recognition and sanction of preexisting custom, amounting in effect to a local common law.").

grantor, these officials were to "set their Hands to it."[37] Only then could the deed be "deliver'd to the Clerk of the Inrolments."[38] In all these cases, the acknowledgment is made before a magistrate or other public officer. In many instances, the local recording official was one of the persons primarily concerned with taking acknowledgments. In the American colonies, county recorders, judges, and justices of the peace were the officials most commonly authorized to take acknowledgments. But *not* notaries.

The office of the notary public was of an entirely different character at this time. In England, notaries were not nearly as important as under the European Civil Law traditions. Although they played a notable part in ecclesiastical and commercial affairs, none of the notary's functions was essential to the common law and the Anglo-American modes of proof (based as they were upon the testimony of witnesses in open court). It is therefore perhaps unsurprising to see an extremely curtailed role for notaries in colonial America, essentially limited to certifying certain types of commercial instruments and noting protests of negotiable instruments—part of the customary "Law Merchant" rather than the common law.[39] Even in England, the early 19th-century expansion of the notarial office beyond the confines of ecclesiastical jurisdiction did not entail an expansion of notarial powers into a mode of common law proof.[40]

A major shift in American notarial practice occurred in the 19th century. In a rapidly expanding society with a frontier moving ever westward, states and territories were faced with numerous problems of residents in remote locations who were unable to find qualified officers

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[37] WILLIAM BOHUN, PRIVILEGIA LONDINI: OR, THE RIGHTS, LIBERTIES, PRIVILEGES, LAWS, AND CUSTOMS OF THE CITY OF LONDON 241 (3d ed. 1723). Also cited in Haskins, *Beginnings*, *supra* n.25, at 297 n.81. As Haskins notes, although this work was written in the early 18th century, the customs it describes go back many generations earlier.
[38] BOHUN, PRIVILEGIA, *supra* n.37, at 241.
[39] John E. Seth, *Notaries in the American Colonies*, 32 J. MARSHALL L. REV. 863 (1999). *See also* C.W. BROOKS, R.H. HELMHOLZ & P.G. STEIN, NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION 68 (1991). These types of notarial acts that have all but disappeared in modern notarial practice.
[40] For example, statutory regulation of the office of notary did address notarial duties (except for the "protocols") but were rather focused on qualifications for office. *See* the Publick Notaries Act of 1801, 41 Geo. 3, c. 79.

(judges or justices of the peace) to take acknowledgments. State and territorial legislatures eventually alighted upon the expediency of granting notaries the power to take acknowledgments and verifications on oath (*i.e.*, to take affidavits).[41] Thus, for example, as a frontier state Illinois authorized notaries to take acknowledgments in 1829.[42] Long-settled Massachusetts, a relative laggard, only granted notaries such powers in 1867.[43]

Today, the office of notary in the U.S. has been almost entirely refocused from international commerce and maritime matters to purely domestic affairs. Rather than officers providing important legal services, today's American notaries serve two main functions: administering oaths and authenticating voluntarily made signatures on documents. The expanded number of those holding the office, and the concomitant lowering of the office's duties, have made American notaries something completely different from their foreign counterparts. As the U.S. Supreme Court succinctly put it, today's American notaries are "essentially clerical and ministerial" officers who must serve honestly, but whose office requires little skill.[44]

From this history, three lessons emerge: First, acknowledgment law was originally a distinct body of law concerned primarily with real property instruments; a proper acknowledgment being necessary to admit a document to the county recorder's records, or into evidence in court.[45] It was unconnected to the world of notaries and the mercantile law under which they operated. Second, although it incorporated prior English custom, acknowledgment

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[41] Another expediency was to allow an alternative to acknowledgments, the "proof" by subscribing witness. This permitted a grantor to execute a deed before one or more witnesses, who also signed the deed. If the grantor were to die before making an acknowledgment before a notary, one of the witnesses could nonetheless testify to the execution before the notary at a later time. *See* 1 CORP. JUR., ACKNOWLEDGMENTS § 23 (1914); 1A CORP. JUR. SEC., ACKNOWLEDGMENTS § 8 (2020).

[42] REV. LAWS ILL., Conveyances, at 137–38 (1833) ("An act to amend the act concerning the conveyance of real property, approved, January 31, 1827, and for other purposes" § 1 (approved Jan. 22, 1829)).

[43] Seth, *Notaries*, *supra* n.39, at 884.

[44] *Bernal v. Fainter*, 467 U.S. 216, 225 (1984). As the Court pointedly noted, there was not even any requirement under Texas law for a notary to be tested for having any familiarity at all with state law. *Id.* at 227–28.

[45] The evidentiary issues of acknowledgments are largely beyond the scope of this paper.

law since the 1600s has been primarily *statutory* law: the "common law" of acknowledgments as developed by state courts has from the beginning been one primarily concerned with statutory construction.[46] Finally, there is nonetheless a significant overlap between the law of acknowledgments and the related body of notarial law, custom, and practice with which it has substantially merged since the 19th century.

II. THE ATOM SPLITS

> *"The statute uses the word presence, but has not attempted to define it. . . . It is a word of which every man has something like a just idea, but which no man can accurately define."*
>
> *Nock v. Nock's Executors* (1853)[47]

Imagine an atom. It consists of one proton, one neutron, and one electron. Chemists would call this atom "deuterium," or "heavy hydrogen."[48] In this atom, the proton and the neutron are tightly packed together, bound by the "nuclear force" of elemental physics.[49] The electron circles around the outside, an ancillary but nevertheless important part of the atom, bound more lightly to the nucleus through the electron's attraction to the proton in the nucleus via the elemental "electromagnetic force."[50] This atom is one of the simplest elements in the physical universe. Its nature is well-understood, and by and large, it is no longer interesting.[51]

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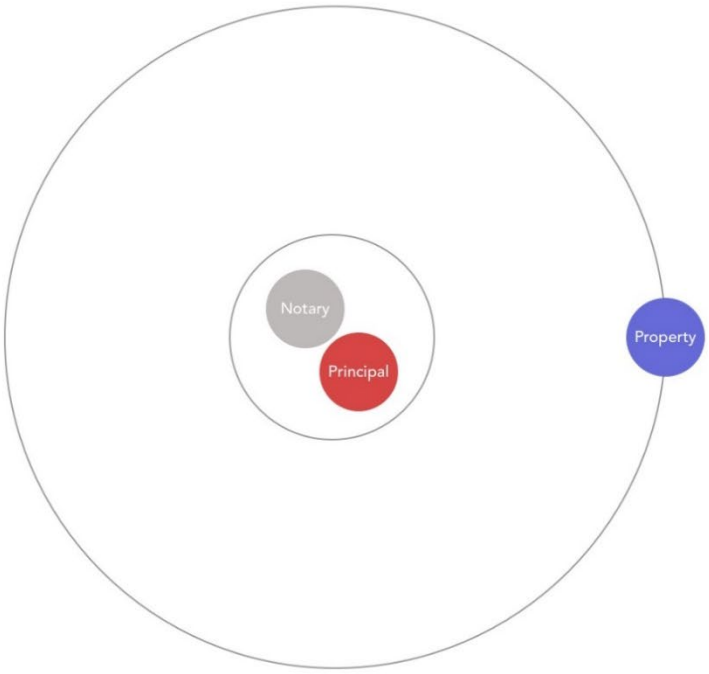
[46] 91 AM. JUR. PROOF OF FACTS 3d 345, ACKNOWLEDGMENT OF REAL PROPERTY INSTRUMENTS AND OTHER ACKNOWLEDGMENTS § 1 ("An acknowledgment procedure . . . is strictly statutory and varies from state to state."); 1 CORP. JUR., ACKNOWLEDGMENTS § 68 (1914) ("The practice of acknowledging written instruments being of statutory origin, it follows that an acknowledgment has only such effect as the statutes give it . . . .").
[47] 51 Va. 106, 117–18 (1853).
[48] *See, e.g.*, WIKIPEDIA, *Deuterium*, https://en.wikipedia.org/wiki/Deuterium (last visited Aug. 30, 2020).
[49] *See, e.g.,* WIKIPEDIA, *Atomic nucleus*, https://en.wikipedia.org/wiki/Atomic_nucleus (last visited Aug. 30, 2020).
[50] *E.g., id. See also* WIKIPEDIA, *Nuclear force,* https://en.wikipedia.org/wiki/Nuclear_force (last visited Aug. 30, 2020).
[51] Neither of us are physicists, and we recognize that there exists significant debate about the nature of quantum reality and the subatomic particles that comprise protons, neutrons, and electrons. Nevertheless, the basic atomic structure we discuss above has been grade-school level science for at least 40 years.

So also with notarization. For over a century, an American notarization in a real estate transaction has looked a lot like a heavy hydrogen atom, as we describe below. And like scientists who have largely lost interest in a simple and well-understood element of the physical universe, the legal world too has grown so used to the basic atom of notarization that it has received little genuine attention for decades.

The notary is the neutron in our atom of notarization. Like a neutron, a notary is neutral and has no inherent attraction to either the principal[52] or the property. The principal and the property are quite happy to exist without a notary at all.[53] Similarly, the principal is the proton in our atom of notarization. The notary and the principal come together to complete the notarization. This tight coupling has been a very strong bond for centuries, exemplified by the legal equivalent of the "nuclear force"—a requirement that the principal "personally appear," come "before," or be in the "presence" of the notary. We will discuss the meanings of those words in detail below, but it is beyond dispute that at the time such legal requirements were drafted, they meant a meeting "in the flesh" and in the same place. And finally, we can consider the real property to be analogous to the electron in our atom of notarization. The property circles around the outside of the notary-principal bond, attracted to the principal but having no particular connection to the notary. Below is a visual representation of what we'll call the atom of notarization:

[52] The Virginia law that we will soon discuss, and some other states' remote notarization laws, refer to the individual for whom the notarial act is performed as the "principal." This somewhat-confusing nomenclature has no connection with principal-agency law and should not be construed as forming an agency relationship.

[53] Chemists would call an atom with one proton, one electron, and zero neutrons "protium." This is the most common isotope of hydrogen, the most common element in the universe. *E.g.*, WIKIPEDIA, *Isotopes of hydrogen*, https://en.wikipedia.org/wiki/Isotopes_of_hydrogen#Hydrogen-1_(protium) (last visited Aug. 30, 2020).



In the early twentieth century, mankind learned how to split the atom by breaking the bonds between protons and neutrons in certain types of atoms. In physics terms, "splitting the atom" really means breaking the strong-force attraction that binds together an atomic nucleus.[54] Doing so unleashes devastating amounts of energy and led to the most horrific weapons ever devised by humankind.[55] Splitting the atom of notarization has less apocalyptic consequences, but nevertheless unleashed forces that the real estate world has been unprepared to absorb or channel. The atom of notarization was first split in a 2011 law passed by the Commonwealth of Virginia, which for the first time allowed the notary and the principal to be physically distant from one another, communicating with each other by means of audio-video conferencing technology.

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[54] WIKIPEDIA, *Nuclear force*, *supra* n.50 ("Energy is released when a heavy nucleus breaks apart into two or more lighter nuclei. The energy is the electromagnetic potential energy that is released when the nuclear force no longer holds the charged nuclear fragments together.").
[55] *Id.* ("The nuclear force plays an essential role in storing energy that is used in nuclear power and nuclear weapons.").

A. The Paperless Chase

By the time of the mid-1990s, the internet had begun to capture the American imagination. The concept of "cyberspace," formerly a term largely used only by devoted fans of William Gibson's famous sci-fi novel *Neuromancer*,[56] had become a buzzword used in the popular lexicon.[57] Both natural and artificial persons scrambled to stake their claims to a place on the world wide web, and the personal computer left the office and moved into the home. In this environment, mail suddenly became "e-mail," signatures became "e-signatures," and few things seemed beyond the reach of the new technology revolution. Everything was suddenly on the fast-track to becoming "paperless."[58]

Notaries were not exempt. Florida first passed a statute explicitly authorizing electronic notarization in 1997.[59] This effort (among other rumblings both state and federal) were soon channeled into a series of three landmark statutes that granted notaries the legal authority to perform notarizations on digital documents. Two of these statutes were model laws promulgated by the National Conference of Commissioners on Uniform State Laws, commonly called the "Uniform Law Commission."

First, in 1999 the Uniform Electronic Transactions Act ("UETA") provided:

> If a law requires a signature or record to be notarized . . . the requirement is satisfied if the electronic signature of the person authorized to perform those acts,

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[56] WILLIAM GIBSON, NEUROMANCER (1984).
[57] *E.g.*, WIKIPEDIA, *Cyberspace as an internet metaphor*, https://en.wikipedia.org/wiki/Cyberspace ("While cyberspace should not be confused with the Internet, the term is often used to refer to objects and identities that exist largely within the communication network itself, so that a website, for example, might be metaphorically said to 'exist in cyberspace.'") (last visited Aug. 30, 2020).
[58] *See, e.g.*, Marc Weiser, *The Computer for the 21st Century*, SCIENTIFIC AMERICAN, Sept. 1991, at 94 ("The most profound technologies are those that disappear. They weave themselves into the fabric of everyday life until they are indistinguishable from it.").
[59] FLA. STAT. ANN. § 117.20 (Fla. Laws 1997, c. 97-241). This has since been repealed by Fla. Laws 1999, c. 99-251, § 165.

> together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.[60]

Shortly thereafter, Congress passed the Electronic Signatures in Global and National Commerce ("E-SIGN") Act, which contained materially similar language:

> If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.[61]

Relatedly, the Uniform Real Property Electronic Recording Act ("URPERA") piled on in 2004 with the following provision:

> A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.[62]

Importantly, each of these three statutes made clear that while notaries were permitted to act on *electronic documents*, they did not alter anything about the underlying substance of notarial practice. The official commentary to UETA thus warned:

> This section permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements. However, the section does not eliminate any of the other requirements of notarial laws, and consistent with the entire thrust of this Act, simply allows the signing and information to be accomplished in an electronic medium.[63]

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[60] Uniform Electronic Transactions Act § 11 (Unif. Law Comm'n 1999), *available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2c38eebd-69af-aafc-ddc3-b3d292bf805a&forceDialog=0 (last visited Aug. 30, 2020).
[61] 15 U.S.C. § 7001(g).
[62] Uniform Real Property Electronic Recording Act § 3(c) (Unif. Law Comm'n 2005), *available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=74220965-5c2b-a93a-545f-de9125a615f4&forceDialog=0 (last visited Aug. 30, 2020).
[63] Uniform Electronic Transactions Act § 11 cmt.

These provisions enabled what eventually came to be called "in-person electronic notarization," or "IPEN."[64] Since time immemorial, notaries and their principals have met, face-to-face, "in the flesh," in order to complete the notarial act. Taken together, UETA, E-SIGN, and URPERA simply provided statutory legitimacy to performing a face-to-face, in-the-flesh notarization on a document that happened to be pixels rather than paper. None of these statutes allowed the notary and the principal to be *physically distant from one another* in a manner that required any communication technology besides those faculties granted by nature.[65]

The world of notaries changed with the passage of the Virginia Electronic Notaries Act of 2011. This was the first law in the United States to "split the atom of notarization." As we discuss below, it allowed the principal and the notary to be literally on other sides of the planet from one another during the notarial act, relying on the use of audio-video conferencing technology to complete the act. This practice eventually came to be called "remote online notarization," or "RON."[66]

B. The Telephone Game

The tempest that this statute would eventually unleash arose in large part because the Virginia act overturned a bevy of caselaw dating back more than a century. The most directly relevant, useful analogy is a comparison between notarial law and the formalities of will execution under the acts regarding wills and testamentary instruments: both bodies of law are concerned with authenticating signatures, screening document signers (to a greater or lesser

[64] *See, e.g.*, American Land Title Association, *Notarization Types and Terminology*, *supra* n.2.
[65] The official comments to UETA make clear that the traditional personal appearance requirement was a substantive rule of notarial law unaffected by its provisions. Uniform Electronic Transaction Act § 11 cmt. (in notarizing a real estate purchase agreement, "the notary must appear *in the room* with the Buyer"; or a court clerk authorized to take affidavits and administer oaths must be "*present* with Buyer *in a room*" (emphasis added)).
[66] American Land Title Association, *Notarization Types and Terminology*, *supra* n.2.

extent), and relying on the presence of disinterested third parties to perform these authenticating and screening functions. As might be expected, the case reporters of both the several states and the courts of England are chock full of challenges to wills arising out of questions about what it means to execute a will in the "presence" of witnesses. Take, for example, the Virginia case of *Nock v. Nock's Executors*.[67]

In *Nock's Executors*, a dying single man with a large estate executed a deathbed will that divided up his estate.[68] The decedent's sister challenged the will, alleging that it was not executed in "the presence of" subscribing witnesses, because the witnesses were approximately 17 feet away from the decedent, in a separate room but within the view of the decedent.[69] The Virginia Supreme Court found against the sister, persuaded by the fact that the decedent could see the activities in the nearby room without visual obstruction, and that the decedent was conscious of the fact that his will was being attested-to.[70] In short, the court concluded: "Proximity and consciousness may create presence."[71]

Nock's Executors is thus a classic, early case in which Virginia adopted the English rule in construing "presence" to mean *line of sight*, although the witness need not actually see the testator.[72] Other states have adopted the alternative *conscious presence* rule.[73]

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[67] 51 Va. 106 (1853).
[68] *Id.* at 106–07.
[69] *Id.* at 117.
[70] *Id.* at 125–26.
[71] *Id.* at 119.
[72] Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1169 (1993).
[73] 95 CORP. JUR. SEC., WILLS §§ 297–301; ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 152–54 (10th ed. 2017). *Compare Cunningham v. Cunningham*, 80 Minn. 180, 83 N.W. 58 (1900) (will upheld where witnesses signed in room adjacent to testator's bedroom shown to be in testator's "conscious" presence) *with Stevens v. Casdorph*, 203 W.Va. 450, 508 S.E.2d 610 (1998) (will invalidated where bank tellers signed in their work stalls while testator sat in bank lobby). The Uniform Probate Code § 2-502(a) (Unif. Law Comm'n 1969, rev. 2019) removes the presence requirement altogether for witnesses to wills, instead allowing the witness to take the testator's acknowledgment of a previously signed will and to sign as a witness within a "reasonable time" of such acknowledgment.

Notarial law has not adopted these precise gradations or alternative distinctions in what it means to "personally appear" or to come "before" a notarial officer, which is the usual textual requirement of acknowledgment statutes and other notarial laws rather than "presence."[74] In other words, courts have not expressly applied either the *line-of-sight* or the *conscious presence* tests from the will execution context to notarial law. This is perhaps not surprising since most notarial acts are not the act of witnessing an event, but rather the performance of an oral interaction—whether making a declaration (acknowledgment) or swearing to the truth of a statement under oath—and a reduction of that interaction to writing. Nonetheless, these concepts provide a direct analogy for understanding the requirements for the performance of notarial acts by notaries and other public officers.

Other sources reaffirm this link. As described above, notarial law continues to be a mix of both common and statutory law, and this includes the "presence" requirement. Well before notaries were authorized by state legislatures to take acknowledgments, it is well documented that signers, oath takers, and deponents were required by customary practice to appear "before" the notary at the time of the notarial act. One useful body of evidence comprises notarial

[74] The notarial laws of a few states include an explicit "presence" requirement. CONN. STAT. § 3-94a (acknowledgment requires admission and jurat a signature "in the notary public's presence"); DEL. CODE § 4309 (referring to "the individual whose signature and presence is being certified"). In several states, the "presence" requirement applies only to verifications on oath (jurats): the purpose of such "presence" is for the notary to witness the execution of the document, a requirement not applicable to taking acknowledgments. CAL. GOV. CODE § 8202(a) ("The affiant shall sign the document in the presence of the notary"); NEW MEX. STAT. ANN. § 14-12A-2 (an acknowledgment must be made "at a single time and place" and a jurat signed "in the presence of the notary public"); ARIZ. REV. STAT. § 41-311 (acknowledgment if signer "appeared before the notary" but jurat requiring signature "in the notary's presence"). Oregon has enacted the Revised Uniform Law on Notarial Acts (hereinafter "RULONA") and its "personal appearance" requirement, ORE. REV. STAT. § 194.235, but by regulation it is official misconduct not to require physical presence. ORE. ADMIN. RULES § 160-100-0610(37) ("A notary public did not require the physical presence of the signer at the time of notarization of a signature executed on a record"). *Compare* FLA. STAT. ANN. § 117.107 ("A notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the presence of the notary public at the time the signature is notarized") *with* R.I. Executive Order 09-08 Notary Public Code of Conduct Disciplinary Procedures § 2 (acknowledgment made and taken "at a single time and place"; jurat requires signer "at a single time and place" to sign "the document in the presence of the notary public"). Mississippi's recent enactment of RULONA requires a signer to "appear physically in person before the notarial officer," which is intended as a direct rejection of remote online notarization in the state. H.B. 1156, at § 7 (Miss. 2020).

handbooks and manuals, an underutilized genre of historical legal literature. A prominent 18th-century manual of notarial practice in Scotland that went through several editions put it thus: "And also, he ought to make Attestation for no other Thing than what fall under the Sense of his Body, and which he distinctly perceives."[75] Such perceptions through bodily senses of course required the notary to be physically present with the persons and events perceived—or even to touch a single object.[76]

Similarly, a 19th-century English handbook provides forms for various types of notarial certificates, nearly all of them stating that the declarant "personally appeared and came before" the notary.[77] These forms were not promulgated by legislation but rather were a product of customary practice.[78] Nonetheless, this customary practice had the force of law: the absence of the words "before me" was found by English courts to invalidate a jurat prepared by a notary because the courts refused to infer the fact of the attestor's presence where it was not certified.[79] Early American court decisions followed this rule, strictly construing the requirements of customary forms of notarial certificates, although later strict application of the rule was

[75] ARS NOTARIUS: OR, THE ART AND OFFICE OF A NOTARY PUBLICK AS THE SAME IS PRACTICED IN SCOTLAND 295 (1740); 248 (5th ed. 1811).
[76] A curious practice in Scotland under the Subscription of Deeds Act of 1681 required deed witnesses to touch the notary's pen, although no notation of such touching needed to be made. This requirement was only repealed by the Conveyancing Act of 1874. ARS NOTARIUS, *supra* n.75, 308 (1740); 258 (5th ed. 1811); 1 ALEXANDER MONTGOMERIE BELL, LECTURES ON CONVEYANCING 39 (2d ed. 1876).
[77] RICHARD BROOKE, A TREATISE ON THE OFFICE AND PRACTICE OF A NOTARY IN ENGLAND, 246–48 (2d ed.1848) (noting that foreign powers of attorney are customarily "made either before a justice of the peace, or a notary"); *id.* at 312, 313, 316, 318, 319, 321, 322, 323, 326, 328, 330, etc. (forms of certificates or "precedents" in which attestations are made "before me, R.B., notary public" or in which the declarant "personally came and appeared, before me, R.B., a notary public").
[78] For example, although other treatises on notarial practice suggested that an acceptor *supra protest* must "personally appear before a notary," it is stated that "at present, *by the custom of merchants*, there is no foundation for that assertion . . ." *Id.*, at 116 n.1 (emphasis added).
[79] *Graham v. Ingleby*, 1 Exch. Rep. 651 (1848) (citing *Reg. v. Bloxam*, 6 Q.B. Rep. 528 (1844) & *Reg. v. Norbury*, 6 Q.B. Rep. 534, note (1846) ("Here it does not appear that the affidavit was sworn before any one.")). By contrast, a jurat evidencing an oath before a judge need not contain the words "before me" because personal appearance is implied by the judge's office. *Empey v. King,* 13 Mees. & W. 519 (1844).

somewhat softened.[80] Thus, at common law, document signers were required to "appear before" a notary, which meant *contemporaneous physical presence* at the time of the oral communication between signer and notary.

American courts have likewise universally interpreted the *statutory* requirement that a person acknowledging a document appear "before" a notarial officer similarly to mean physical presence, notwithstanding slight differences in wording of statutory forms of certificates.[81] Without physical presence, the notary would be signing a false certificate and opening him/herself up to negligence liability, as well as constituting professional misconduct.[82]

This was the state of acknowledgment and broader notarial law when, in the late 19th century, the emergence of a new technology first began to call into question both the purpose and contours of the "presence" requirement: the telephone. With this newfound communication technology, could a person be "present" for purposes of a legal act if they were present by voice, but not by sight or physical location? After all, as even the *Nock's Executors* court observed, "A blind man can make a will; which of course he could not do if sight were necessary."[83] The answer came back as "no."

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[80] *Smart v. Howe*, 3 Mich. 590, 595 (1855) ("The defendant insists that . . . no particular form of expression is required in the *jurat,* either by the statute or rules of court. This is true, but we have seen that the books of practice and the reports do recognize and insist upon the necessity of incorporating into the *jurat* the fact that the affiant was sworn by the officer who signs the *jurat*.") *But see*, *contra*, FREDERICK M. HINCH, JOHN'S AMERICAN NOTARY AND COMMISSIONER OF DEEDS MANUAL § 113, at 84 (3d ed. 1922) ("The statement of the personal appearance of the affiant before the officer administering the oath varies somewhat in the different states, and usually slight irregularities in the wording do not invalidate the affidavit. Thus, the omission, of the words 'before me' has been held to be immaterial, when the affidavit stated that the person 'then personally appeared,' as it was apparent that the person sworn appeared before the notary"; citing *Clement v. Bullens*, 159 Mass. 193, 34 N.E. 173 (1893)).
[81] *State ex rel. Savings Trust Co. v. Hallen*, 196 S.W. 1067 (Mo. App. 1917) (certificate that wife "before me personally appeared" was false for "certifying to a wife or any person, as present, who was not").
[82] HINCH, *supra* n.80, § 252, at 138 ("Certifying to a person being present, when he or she is absent, is negligence, rendering the notary liable on his bond as for a false certificate.").
[83] 51 Va. at 119.

In *Carnes v. Carnes*,[84] the Georgia Supreme Court dealt with the question of "telephone notarizations." Notably, its reasoning and the holding retains its validity today, being explicitly upheld by the Georgia Supreme Court just two decades ago (*i.e.*, after the invention of the internet).[85] In a dispute that would be nearly as at home today as it was a century ago, a professional baseball player and his wife were engaged in an acrimonious breakup.[86] The estranged wife filed for a writ of *ne exeat* that would have incarcerated her estranged husband in order to prevent him from leaving the state and avoiding his familial support obligations.[87] To accomplish the task, she needed to sign an affidavit under oath. But she did not sign the affidavit by physically traveling to meet the notary public. Instead, she called the notary on the telephone, told the notary that her attorney would be bringing to the notary a document, and that she was swearing to its contents. The notary replied, "All right," and he notarized the affidavit upon its arrival in the hands of the estranged wife's counsel.[88]

The Georgia Supreme Court was not impressed. It stated:

> In order to make an affidavit, there must be present the officer, the affiant, and the paper, and there must be something done which amounts to the administration of an oath. There must be some solemnity, not mere telephone talk. Long-distance swearing is not permissible. Telephonic affidavits are unknown to the law.[89]

The *Carnes* court's reasoning was based in no small part on the fact that there is no way definitively to link the document in the affiant's mind with the physical document that happens to show up before the notary.[90] While it can certainly be argued that this is little different from

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[84] 138 Ga. 1 (1912).
[85] *Sambor v. Kelley*, 271 Ga. 133, 518 S.E.2d 120 (1999).
[86] 138 Ga. at 1.
[87] *Id.*
[88] *Id.* at 5–6.
[89] *Id.* at 6.
[90] The court continued, at the same page:

> A moment's thought will show a sound reason for this. An officer hears a voice coming through the receiver of a telephone. For identification he must rely on recognition of the voice (if he knows

"the sight problem" discussed above—could a blind person really "know" that the document being notarized is, in fact, the same one that such person signed?—it is easy to get caught up in this debate without realizing that there is actually a deeper problem:

> If this is an oath, when is it taken[?]—when the telephone message is sent, or when the paper is later presented by the third person? Where is it taken[?]—at the place where the affiant is, or that where the officer is? Suppose they should be in different counties, where would be the jurisdiction of a prosecution for perjury, if the oath were untrue? It will be seen that great confusion might easily arise from such a system.[91]

The "great confusion" predicted by the *Carnes* court is precisely what came to pass. Foreseeing it, courts had implicitly resisted the idea of "remote notarization" for decades, notwithstanding the considerable advances in communication technology and changing social practices.[92] Indeed, an attempt to override these court precedents and legislatively allow "telephone notarizations" in the early 1980s through the Uniform Law on Notarial Acts ("ULONA") was defeated precisely because of the numerous questions the practice would have raised.[93] The challenges can be broken down into three basic moving parts:

> it) and the statement of the person as to who he or she is. Reference is made to some paper, more or less fully described. Later a third person presents to the notary a paper as being the one sworn to. How does the notary know, except by hearsay, that the paper presented is the identical paper mentioned?

[91] *Id.*

[92] *See, e.g., Sambor v. Kelley*, *supra* n.85, 271 Ga. at 134, 518 S.E.2d at 121 ("Sambor also argues that the rule in *Carnes* is outdated and does not reflect modern law practice. The administration of an oath and the proper attestation of documents is not irrelevant, however, simply because the means of communication have changed greatly since the first part of this century."). *See also Hutchinson v. Stone*, 79 Fla. 157, 166, 84 So. 151, 154 (1920) (equating the statutory requirement of appearance "before" a notary with "personal presence"). Further cases spanning from 1889 to 1974 showing that a majority of courts rejected the concept of "telephone notarizations" are collected in 58 A.L.R. 604; *see also* the earlier cases collected in 12 A.L.R. 538. For contrary cases disallowing extrinsic evidence of a telephone notarization to impeach the notarial certificate in the absence of a showing of fraud or duress, *see Banning v. Banning*, 80 Cal. 271, 22 Pac. 210 (1889), and *Abernathy v. Harris*, 183 Ark. 22, 34 S.W.2d 765 (1931).

[93] The first reading of ULONA at the Uniform Law Commission's 1981 annual meeting won narrow approval of "telephone notarizations," but this position was later reversed. *See* Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 J. MARSHALL L. REV. 749, 772–73 (1998). As finally approved and adopted in 1982, ULONA's official comments specifically state that "appearing before" a notarial officer requires "the personal physical presence" of the signer. Uniform Law on Notarial Acts, § 2 Comment (Unif. Law Comm'n 1983).

1) Where does it happen when it happens online? (the "Location Question")
2) How do I know that the "right" person signed it? (the "Authentication Question")
3) Is the notarization of a document executed this way recognized as valid in other states? (the "Interstate Recognition Question")

As discussed below, the Virginia law attempted to answer the first two questions, albeit in ways that (in our view) are respectively both overreaching, and opaque. It could not answer the third, and that is precisely what touched off the wave of online notary legislation that swept the United States in the latter half of the 2010s.

C. The Virginia Electronic Notary Act of 2011

In a prescient article published more than two decades ago, Charles Faerber suggested that the then-budding field of internet teleconferencing technology would "likely bring [a] broadened statutory definition of 'personal appearance,'" and suggested that "[t]he notary's audial interaction with the absent signer and real-time acquisition of the signer's video image would seem prerequisites for such remote electronic notarizations."[94] Faerber pointed to the elements of *sight* and *sound* as being essential to preserving the notary's traditional role as a safeguard in the notarial process. This was, after all, a major shortcoming of "telephone notarizations," since the notary's interaction with the signer is by sound only.

Virginia was the first state to embrace audio-video conferencing technology as an attempt to overcome the problems raised by "telephone notarizations" that had been tenuously bottled up for more than a century. Although the legislation passed, in our view it did not provide satisfactory answers to the Location Question, the Authentication Question, or the Interstate Recognition Question. Not unlike atomic physics itself, it turns out that splitting the atom of notarization produces highly volatile elements as the outcome.

[94] Faerber, *Being There*, *supra* n.93, at 775.

A word before we delve into the details here. In the pages that follow, we are quite critical of the outcomes that arose from the Virginia statute. In particular, we believe that much of the Virginia statute's reasoning has proven unsound, much of its language has proven too vague, and several of its approaches have proven too technical for the lay public to grasp. We think the fairest reading of the statute's history is that the statute was used in ways that the legislature never intended. That said, we want to be clear that we do not ascribe ill motives to the legislators, secretary of state officials, or others involved in the creation of the statute and its implementing regulations. It's hard to be the first to blaze a new trail, and it's easy to second-guess decisions with 20/20 hindsight. We are sensitive to that, and we mean no disrespect.

That said, we do not shy away from calling out the problems where we see them. We think the most reasonable reading of the history surrounding the Virginia statute is that growth-minded technology startups seized upon an opportunity that the statute created, and they pushed that statute to its logical limits in their attempts to grow aggressively. "All is fair in love and war," as the old proverb goes,[95] and neither business nor politics are much more constrained. We recognize as much, but we also must discuss the problems that were thereby created.

1. The Location Question

The Virginia act attempted to answer the "where does it happen when it happens online?" question through a novel approach: read literally, it effectively declared the whole of the internet to be the sovereign territory of Virginia. The law provides: "An electronic notarial act performed in accordance with this chapter shall be deemed to have been performed within the

[95] *E.g.*, MIGUEL DE CERVATES, DON QUIXOTE, Ch. 21 (Project Gutenberg ed.) ("[R]emember love and war are the same thing, and as in war it is allowable and common to make use of wiles and stratagems to overcome the enemy, so in the contests and rivalries of love the tricks and devices employed to attain the desired end are justifiable . . . ."), *available at* https://www.gutenberg.org/files/996/996-h/996-h.htm (last visited Aug. 30, 2020).

Commonwealth and is governed by Virginia law."[96] Moreover, pre-existing Virginia law stated, "Any notary commissioned pursuant to this title may likewise perform notarial acts outside the Commonwealth, where such notarial acts are performed in accordance with this chapter."[97] Taken together, the upshot of these two provisions was effectively that no matter where in the world the notary might be, and no matter where in the world the principal might be, the notarial act is "deemed" to have occurred in Virginia.

The constitutionality of these provisions is debatable. Certainly, the Virginia legislature has the right to declare Virginia law and make it binding on Virginia courts. But must other sovereign states accept that choice? As traditionally understood under the law of nations, the performance of a notarial act is an exercise of sovereign power (sometimes described as a *quasi-judicial* power) and is validly performed only in the territory of that sovereign.[98] Likewise, if a notary is in the territorial jurisdiction of another sovereign, then the other sovereign need not recognize the notarial act at all.

Thus, to cite the classic example, a French notary may be granted power under French law to perform notarial acts while residing in England—but for purposes of English law and English courts such notarial acts would be "invalid" and "useless to all legal purposes."[99] *Mutatis mutandis*, the same analysis applies to Virginia notaries' performance of notarial acts in other states, subject only to overriding constitutional imperatives. And given the limits on the ability of states to project their sovereign power into sister states under the Due Process

[96] VA. CODE § 47.1-13(D).
[97] VA. CODE § 47.1-13(B).
[98] Daunis McBride, *Validity and Effect of Quasi Judicial Acts outside of Jurisdiction*, 4 VA. L. REG. 81 (1918).
[99] BROOKE, TREATISE, *supra* n.77, at 18–19. This prominent 19th-century commentator was observing the limitation of the Act 6 Geo. 4, c. 87, § 20, which granted foreign consuls "power to do all such notarial acts as any notary public may do" at a foreign port, explaining that "an enactment of the British legislature cannot have any effect in courts of law out of the British dominions, if it relate to acts authenticated or done out of them."

Clause[100] as well as the limited reach of the Full Faith and Credit Clause, which we discuss below, the general limiting principle as between French and English notaries holds true as between the states.

These jurisdictional puzzles were a major reason that courts objected so strenuously to telephonic notarizations, as discussed above. Even if courts accepted the practice when both the notary and principal were within the notary's jurisdiction (whether a single county or an entire state), if the principal were located outside of the notary's jurisdiction it simply became impossible to determine "where" the notarial act took place. One early court decreed such a notarial act a "nullity," rendering the document "void and of no effect" even if the use of a telephone to perform the act were condoned.[101]

It was easy to say "where" a notarial act occurred when a notary and a principal were physically together at the same time: it happened wherever the two persons were, physically. But when they are far-flung, does the notarization occur in the notary's location, or in the principal's location? Moreover, given that under Va. Code § 47.1-13(B) a Virginia online notary can in theory be located anywhere in the world when he or she exercises her notarial powers, Va. Code § 47.1-13(D)'s decree that the notarial act is "deemed" to have occurred in Virginia represents

[100] Ever since the seminal *Pennoyer v. Neff*, 95 U.S. 714 (1878), the limits of state sovereignty as to the reach of a state's courts has been subjected to a Due Process analysis. There are deep-rooted constitutional rules governing the abilities of states to gain "long-arm" jurisdiction over persons who may be located in sister states. This "minimum contacts" jurisprudence beginning with *Int'l Shoe*, 326 U.S. 310 (1945), may well provide Virginia with the ability to gain personal jurisdiction over an individual who chooses to utilize the services of a Virginia electronic notary public. However, establishing personal jurisdiction over a Virginia notary's principal is not the same as exercising the quasi-judicial notarial power directly in another state. The difference is subtle but important: The first question involves whether a person has "purposefully availed" him or herself of the services of a Virginia notary; the second involves determining whether the act of the Virginia notary is valid in the place where the act was performed.

[101] *Fairbanks, Morse & Co. v. Getchell*, 13 Cal.App. 458, 462, 110 Pac. 331, 332 (Cal.App. 2 Dist. 1910) (discussing a notary commissioned to perform notarial acts only in Kern County, California, administering an oath over the telephone to a person located in Los Angeles).

uncharted territory that, when read literally, effectively declares the whole of the internet to be located in Old Dominion.

Adding to this thorny debate is the so-called "commissioner of deeds" problem. In the world of traditional notarizations requiring physical presence, a common 19th-century official was a "commissioner of deeds," a notarial officer authorized to notarize documents while physically in the territory of another state.[102] But, because such notarizations were presumed invalid under the laws of the other state, a strict nexus requirement was imposed: only documents affecting property located in the commissioning state could be notarized.[103] Thus, a New York commissioner of deeds located in California could only notarize documents related to New York property. The use of commissioners of deeds was therefore a practical solution to the thorny jurisdictional questions described above; it saved notaries from potential liability and document signers from having their documents decreed invalid.

For purposes of the present discussion, assume that Virginia's remote notarizations are occurring on documents affecting real property. That real property might be located in the Commonwealth of Virginia, or it might not. If it is not, how can Virginia "deem" itself to have say-so over the validity of a notarial act affecting property located in the borders of a sister state? Virginia's remote notarization law blasted apart the crucial limitation built into the

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[102] For evidence of how widespread the office was a century ago, see HINCH, *supra* n.80, §§ 505–58, at 331–46 (citing statutes, as of 1922, for all 48 states plus Alaska, Puerto Rico, and the District of Columbia). The basic nature of the office is described in *id.* § 505, at 331. The history of commissioners of deeds dates to the early 19th century. For example, in New York, the office of commissioner of deeds was first created by statute in 1818, but its holders were restricted to performing various notarial acts within the state. Only in 1840 did legislation permit the appointment of commissioners to take acknowledgments in other states and territories of instruments to be used in New York. On this history, *see* JOSEPH OSMUN SKINNER, A HANDBOOK FOR NOTARIES PUBLIC AND COMMISSIONERS OF DEEDS OF NEW YORK § 69, at 87–90 (1912).

[103] The office of commissioner of deeds is now essentially defunct in American practice, with commissioners being actively appointed only in Florida, New Hampshire, and Hawaii. Nonetheless, a few states continue to have statutes authorizing commissioners of deeds on their books, *e.g.*, FLA. STAT. ANN. §§ 721.96 *et seq.*; HAW. REV. STAT. §§ 503b-1 *et seq.*; MO. STAT. § 486.100 *et seq.*; N.H. REV. STAT. §§ 455:12 *et seq.*; N.J. STAT. § 52:6-12 *et seq.*; N.Y. EXEC. LAW §§ 139–141; TEX. GOV. CODE § 406.051 *et seq.*; and W.V. CODE §§ 39-4A-1 *et seq.*

"commissioner of deeds" system by allowing Virginia notaries to notarize *any* document affecting *any* property located *anywhere* in the world. In short, the Virginia statute attempted to decree an answer to the heretofore-unnecessary question of "where" the notarial act occurs after Virginia split the atom of notarization, but Virginia's solution is unsatisfactory for other states and potentially problematic for Virginia notaries and document signers alike. We deal with these interstate recognition questions in further detail below.

2. The Authentication Question

The second major challenge that arose from the Virginia statute was how to authenticate the principal. In no small part, this is due to the nebulous language of the Virginia statute itself. The statute handles the authentication question by means of a lengthy definition entitled "Satisfactory evidence of identity." It provides in relevant part:

> In the case of an electronic notarization, 'satisfactory evidence of identity' may be based on video and audio conference technology . . . that permits the notary to communicate with and identify the principal at the time of the notarial act, provided that such identification is confirmed by (a) personal knowledge, (b) an antecedent in-person identity proofing process in accordance with the specifications of the Federal Bridge Certification Authority, or (c) a valid digital certificate accessed by biometric data or by use of an interoperable Personal Identity Verification card that is designed, issued, and managed in accordance with the specifications published by the National Institute of Standards and Technology in Federal Information Processing Standards Publication 201-1, 'Personal Identity Verification (PIV) of Federal Employees and Contractors,' and supplements thereto or revisions thereof, including the specifications published by the Federal Chief Information Officers Council in 'Personal Identity Verification Interoperability for Non-Federal Issuers.'[104]

If you can grasp what this definition requires, then you are indeed a technically sophisticated reader. Let us unpack the relevant parts of this provision.

[104] VA. CODE § 47.1-2.

First, it is possible under provision (a) above that the notary could "personally know" the principal. Personal knowledge was historically one of only two methods to identify principals until states began to permit the use of government identity credentials over the past four decades.[105] Today, personal knowledge is possible for almost any notarial act,[106] but in garden-variety real estate transactions, it is rare for obvious statistical reasons. Even in those instances where a notary *does* actually know the principal, the notary's relationship with that person cannot be "too close" such that it threatens the independence of the notary's judgment.[107] Given the limitations of "personal knowledge" as an authentication mechanism, few notarizations occur this way in the real estate world.

Next, let us briefly mention the third possibility, contained in subsection (c) above: that the principal has a "digital certificate accessed by biometric data" or by a high-tech "Personal Identity Verification card" that meets particular federal security standards. We will not belabor this discussion other than to say that few are able as a practical matter to access this high-tech means of authentication.

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[105] In 1982, California became the first state to allow certain government-issued identification documents to constitute "satisfactory evidence" of identity in response to the decision in *Allstate Savings and Loan Assoc. v. Lotito*, 116 Cal.App.3d 998, 172 Cal.Rptr. 535 (Cal. Ct. App. 1981). The Uniform Law Commission quickly followed suit by permitting "identification documents" in ULONA § 2(f). For the legislative history of California's 1982 enactment, *see Old Republic Nat. Title Co. v. Thomas*, 2014 WL 7215186 at *5–6 (Cal. Ct. App. 2014). For an old but useful summary of the prior law reaching back into the 19th century, *see* W.M.G, *Notaries Public: Duty in Taking Acknowledgments: Certification upon Personal Knowledge*, 12 CAL. L. REV. 229 (1924). For a (now dated) overview of state statutory requirements for the three methods of identification (personal knowledge, credible witness, identification documents), *see* Peter J. Van Alstyne, *The Notary's Duty of Care for Identifying Document Signers*, 32 J. MARSHALL L. REV. 1003, 1017–29 (1999).

[106] California is the only state that does not permit a notary to perform a notarial act for someone on the basis of personal knowledge alone. Rather, every principal must be identified on the basis of one of the methods set forth in CAL. CIV. CODE § 1185(b).

[107] *See*, *e.g.*, Revised Uniform Law on Notarial Acts § 4(b) (2018) ("A notarial officer may not perform a notarial act with respect to a record to which the officer or the officer's spouse is a party or in which either of them has a direct beneficial interest."). For the case law behind this modern statutory rule, *see* 1 CORP. JUR., ACKNOWLEDGMENTS §§ 110–20 (1914) (reasons for disqualification for interest); 1A CORP. JUR. SEC., ACKNOWLEDGMENTS §§ 33–37 (2020) (same). *See also* Carole Clarke & Peter Kovach, *Disqualifying Interests for Notaries*, 32 J. MARSHALL L. REV. 965 (1999); Michael L. Closen & Trevor J. Orsinger, *Family Ties That Bind, and Disqualify: Toward Elimination of Family-Based Conflicts of Interest in the Provision of Notarial Services*, 36 VALPARAISO UNIV. L. REV. 505 (2002).

That leaves the final option arising under the language of subsection (b); namely, "an antecedent in-person identity proofing process in accordance with the specifications of the Federal Bridge Certification Authority." What precisely does this mean? As it turns out, no one can really say for certain.

There are only three fundamental ways to authenticate a person: something they have (a *token*); something they know (a *shared secret*); or something they are (*biometrics*).[108] Each method has its advantages and disadvantages, and none is inherently superior to another. And there is a litany of different methods that can fall under any given category. For example, a handwritten nametag that states "Hi, My Name Is Alice" is a token, but it is a weak token that is easily compromised. By contrast, a high-tech Personal Identity Verification card as discussed above is also a token, but it is a strong token that is difficult to compromise. For each of the fundamental categories of authentication, there exists a range of options that anyone can deploy, depending on the circumstances. What is an appropriate level of authentication for logging one's record as the high score on Pac-Man is not the same as the level of authentication appropriate to launch a nuclear missile.

At a non-technical level, the Federal Bridge Certification Authority ("FBCA") is an entity that created a menu of options that could be deployed for various authentication situations involving federal government business.[109] The menu is broad and deep. Unfortunately, the Virginia statute does not tell the reader which item on the menu is to be selected. Indeed, the exact wording ("an antecedent in-person identity proofing process in accordance with the

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[108] *See, e.g.*, ELEC. FIN. SERVS. COUNCIL, STANDARDS AND PROCEDURES FOR ELECTRONIC RECORDS AND SIGNATURES, at 1–49 (version 2.0, Nov. 2011) (hereinafter "SPeRS") ("Credentials tend to employ one or more of three basic elements: Something the user *knows* (*e.g.*, password, PIN); [s]omething the user *possesses* (*e.g.*, ATM card, smart card); and [s]omething the user *is* (*e.g.*, biometric measurement)." (emphases in original)).
[109] *Certification Authorities – Federal Bridge Certification Authority*, https://fpki.idmanagement.gov/ca/#federal-bridge-certification-authority (last visited Aug. 30, 2020).

specifications" of the FBCA) seems to suggest that *anything* on the menu meets the test, as long as it is "antecedent" and "in-person." This is a bit like saying that one must order a sandwich, but without specifying whether it should be a quadruple bacon cheeseburger or a kid-sized junior hamburger.

To that point, legislative history casts doubt on whether the Virginia legislature had a full grasp of what they were creating in voting for this statutory language. The authors are in possession of a DVD of the debates about the Virginia statute that took place in the Virginia House of Delegates. The lead floor proponent of what would become the Virginia statute stated on the House floor that under this language, no one would just be allowed to hold their ID up in front of a camera. Rather, she contended that the notary's principal would go *in-person* to a *third party* for authentication *before* they operated online. In relevant part, she stated that the proposed law required, *inter alia*, "Reliance on in-person identity proofing by a third party such as a bank, law firm, or title company."[110] Further, in response to adverse statements against the bill inveighing against the "robosigning" foreclosure crisis of the time, she further stated:

> Just to respond to a couple of comments . . . certainly we . . . have all been concerned about the mortgage fraud that's been going on. And I would say to you that this [bill] actually makes the protections [against foreclosure fraud] stronger because . . . just to help [the House] understand what the videoconferencing involves, it's not a person standing up there holding their document in front of them and trying to examine a driver's license or something.[111]

In short, it appears that most fairly construed, the floor proponents of the Virginia statute envisioned a system in which the notary's principal would go *in-person* into a bank, law firm, or title company, bring proof of identity with them, have that proof of identity examined *in-person* by a trusted third party, and

[110] Statement of Delegate Kathy J. Byron on Va. H.B. 2318, Jan. 31, 2011 (DVD on file with authors).
[111] *Id*.

then receive some sort of login credentials *subsequently* permitting the principal to meet a notary online.[112]

This was definitely *not* the system that ultimately resulted from the Virginia act. In actual implementation, vendors of remote notary services decided that the best way to conduct an authentication "in accordance with the specifications" of the FBCA was under the "Medium" assurance level provided by § 3.2.3.1 of the X.509 Policy of the Federal Bridge Certification Authority. Before we delve into the technically thick language of this provision, consider first the policy choice made in selecting the "Medium" level of assurance as defined by the FBCA. Compared to the "Rudimentary," "Basic," or "High" levels as defined by the FBCA, the choice of "Medium" seems reasonable in a vacuum. But that policy choice may or may not be the one the legislature had in mind—there is no way to know. And further, one can reasonably debate whether § 3.2.3.1 is even the "right" section of the 120+ page FBCA document to leverage for remote notarization issues. Again, under the vague language of the statute, there is no way to know.

Beyond that policy interpretation lies the challenging language of this provision itself, which in its current form provides as follows:

> Identity shall be established by in-person or supervised remote proofing before the Registration Authority, Trusted Agent or an entity certified by a State or Federal Entity as being authorized to confirm identities; information provided shall be verified to ensure legitimacy. A trust relationship between the Trusted Agent and the applicant which is based on an in-person antecedent may suffice as meeting the in-person identity proofing requirement. Credentials required are one Federal Government-issued Picture I.D., one REAL ID Act compliant picture ID [sic] . . . , or two Non-Federal Government I.D.s, one of which shall be a photo I.D. Any credentials presented must be unexpired.

[112] In this way, the system would not have been all that different than going to the DMV with one's birth certificate and social security card, and in exchange for that production of evidence, receiving a driver's license that in turn provides an easier means of authenticating oneself in the future.

> Clarification on the trust relationship between the Trusted Agent and the applicant, which is based on an in-person antecedent identity proofing event, can be found in the FBCA Supplementary Antecedent, In-Person Definition document.
>
> For PIV-I, credentials required are two identity source documents in original form. The identity source documents must come from the list of acceptable documents included in Form I-9, OMB No. 1115-0136, Employment Eligibility Verification. At least one document shall be a valid State or Federal Government-issued picture identification (ID). For PIV-I, the use of an in-person antecedent is not applicable.[113]

If the reader has difficulty parsing this language, the reader is not alone. Real estate lawyers are certainly used to dense provisions, but the density here regards information technology and user authentications, fields foreign to most real estate practitioners. What the reader needs to know is that the startups who became vendors of remote notary services interpreted this language to mean that all the notary's principal needed to do for authentication is to show a driver's license to the camera, and then answer some "out of wallet" questions generated about the principal's credit history (more technically known as a dynamic knowledge-based authentication, or "KBA"). How exactly did this interpretation arise? The argument runs as follows:

- The language quoted above allows for use of a document compliant with the REAL ID Act;[114]
- Most state driver's licenses comply with the REAL ID Act;[115]
- The language quoted above allows for a "remote proofing" before a "Registration Authority";

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[113] FEDERAL BRIDGE CERTIFICATION AUTHORITY, *X.509 Policy of the Federal Bridge Certification Authority*, § 3.2.3.1 (version 2.35, April 15, 2019), *available at* https://www.idmanagement.gov/wp-content/uploads/sites/1171/uploads/fpki-x509-cert-policy-fbca.pdf (last visited Aug. 30, 2020).
[114] Pub. L. No. 109-13, 119 Stat. 302 (2005) (codified at 8 U.S.C. § 1101 *et seq.*).
[115] *See* HOMELAND SECURITY DEPARTMENT, *Real ID*, https://www.dhs.gov/real-id (map showing current states issuing REAL ID Act-compliant driver's licenses) (last visited Aug. 30, 2020).

- Under the "FBCA Supplementary Antecedent, In-Person Definition document" referenced by the language, a "Registration Authority" can conduct such a "remote proofing" by using so-called "out of wallet questions."[116]

This argument chain depends upon a 2009 document entitled "FBCA Supplementary Antecedent, In-Person Definition." This document is now difficult to locate, eleven years after its creation. The link to it in the X.509 policy is ineffective as of this writing. A copy is on file with the authors, however, and in large part its language is every bit as opaque to the IT-untrained eye as is the larger X.509 policy. In relevant part, it allows an "On-Line Verification Methodology" in which the person claiming an identity must successfully answer 4 out of 5 questions about the applicant's past, which questions are "construct[ed] . . . from multiple historical antecedent databases."[117]

Even assuming (without concluding) that § 3.2.3.1 is the "right" section of the X.509 policy for remote notarizations, and further assuming (without concluding) that "Medium" is the "right" level of authentication to require under that section, and further assuming (without concluding) that paragraph 6 of the FBCA supplement is the "right" provision to implement that level of authentication for remote notarizations, there still remains the question of how such a procedure is either "antecedent" or "in-person." The best arguments that the authors have heard offered is that the procedure is "antecedent" because *technically* it occurs moments before the notarization, and is "in-person" because *at some point* in the past, the principal being authenticated likely went into a bank and applied for credit, and this resulted in a credit history from which the "out of wallet" questions are drawn. Needless to say, this slices the intellectual salami quite thinly, and in any event, the whole procedure is inconsistent with the legislative

[116] FBCA Supplementary Antecedent, In-Person Definition (July 16, 2009) (on file with authors).
[117] *Id.*, at p.4, para. 6.

history discussed above. There is little satisfaction to be found in Virginia's attempted answer to the Authentication Question.

3. The Interstate Recognition Question

The third major challenge that arose from the Virginia law was interstate recognition. Although the Virginia statute declares that any Virginia RON is "deemed" to have occurred within the borders of Old Dominion, the Virginia law does not give consideration to what others might think about this choice. That has proven highly controversial.

The Virginia act does require that any Virginia notary who wants to perform notarial acts on electronic documents must be an "electronic notary public."[118] And further, the Virginia act provides that such an "electronic notary public" must have an "electronic notary seal," which must contain "the notary's name, jurisdiction, and commission expiration date and [which will] generally correspond[] . . . to data in notary seals used on paper documents."[119] However, what the statute does *not* require is any indication of whether the notarial act performed was done by IPEN, or by RON. Further, the Virginia Secretary of the Commonwealth makes no such "RON disclosure" requirement in any of its implementing standards.[120] Consequently, examining the face of an electronic document notarized by a Virginia electronic notary does not reveal whether it was notarized "in the flesh," or over the internet.[121]

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[118] VA. CODE § 47.1-2 ("'Electronic notarial act' or 'electronic notarization' means an official act by a notary under § 47.1-12 or as otherwise authorized by law that involves electronic documents.").
[119] *Id.* (definition of "Electronic notary seal" or "electronic seal").
[120] *See* Virginia Electronic Notarization Assurance Standard v.1.0 (Jan. 21, 2013), *available at* https://www.commonwealth.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/VAe-NotarizationStandard2013Version10.pdf (last visited Aug. 30, 2020).
[121] At times, one can look for telltale "product marketing" clues left by technology providers to determine whether or not a document was notarized using a remote notarization procedure. For example, some remote notarization technology companies are eager to place their logo onto a document, which provides strong evidence that its

Depending on one's perspective, this lack of disclosure is either a virtue, or a vice. Over the course of our travels through this space, the authors have spoken with various parties who witnessed the creation of the Virginia act. On the one hand, some have reported that they saw no need to include any type of disclosure about the use of remote notarization. To their minds, this new remote notarization process was meant to be functionally equivalent to an IPEN process that already existed, and so why would there be any reason to distinguish the two? By this reasoning, "RON disclosure" would simply have sown unnecessary confusion. On the other hand, we have also heard it baldly stated that the lack of disclosure was intentional, and was meant to prevent anyone from being able to make conscious judgments about whether or not to accept a document notarized under this *sui generis* process, which some might find objectionable.

Whatever may have been the motivational origins of this choice, its impact was to create a legal regime that in theory allowed Virginia notarizations to be broadcast all over the world. In so doing, this legal regime quickly made itself an incubator for the earliest startups offering RON services. The appeal is obvious: the thousands of notaries spread across the nation owe their entire economic existence to the fact that their services had been tied to physical presence. Society requires enough notaries so that any person who needs one can find one without having to travel undue distances. Indeed, as discussed above at section I.B, it was for this very reason that notaries were given the power to take acknowledgments in the first place in the United States—it had become too hard to locate justices of the peace and similar officers on the frontier.

Such a business model is all but begging for the favored Silicon Valley tactic of "disrupt and consolidate." One need only look at the "retail apocalypse" brought on by the rise of

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notarization was through a remote notarial act. Other providers are less eager to reveal, however, and there is no legal requirement for them to do so under Virginia law or regulation.

Amazon,[122] or the obliteration of the taxi industry brought about by the rise of Uber,[123] to see what these early startups were likely thinking. Just as Delaware famously captured the market on artificial persons in the 20th century,[124] some persons likely fancied Virginia as the forthcoming "Delaware of Notaries," and some startups dreamt of consolidating the entire notary business throughout the United States into their control through the internet's power to stretch its hand across space and time limitations. In short, they sought to "Uber-ize the notary business."

Unfortunately for these startups, the real estate industry is a change-resistant place. Many players in the real estate ecosystem have historically been reluctant to accept electronic documents *at all*, and this technologically backward outlook served them perversely well in this instance. As Virginia RON documents began to show up in other states, lenders and title insurers (being risk-averse by their nature as we discuss below) began to ask questions about the documents' origins. The lack of disclosure about "RON *vel non*" ultimately backfired, because *any* electronic document coming from Virginia now warranted investigation as to its nature. The stage was set for the next chapter in this legal odyssey, as the startups advocating for universal RON acceptance began to lean on arguments deriving from comity and the U.S. Constitution.

D. Comity vs. the Uber-ization of Notaries

Of all the challenges brought on by the advent of remote notarization, none has proven more difficult than the interstate recognition question. Splitting the atom of notarization has

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[122] *See, e.g.,* Derek Thompson, *What in the World is Causing the Retail Meltdown of 2017?*, THE ATLANTIC, Apr. 10, 2017, *available at* https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/ (last visited Aug. 30, 2020).

[123] *See, e.g.,* Michael Goldstein, *Dislocation and Its Discontents: Ride-Sharing's Impact on the Taxi Industry*, FORBES, June 8, 2018, *available at* https://www.forbes.com/sites/michaelgoldstein/2018/06/08/uber-lyft-taxi-drivers/#78dd8c9659f0 (last visited Aug. 30, 2020).

[124] *See, e.g.*, Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 DUKE J. LAW & CONTEMP. PROBS. 135, 136 (2004) ("Delaware's dominance is staggering. . . . In fact, so many companies incorporate in Delaware that incorporation and franchise fees provide one-quarter of total state revenues.").

created nearly intractable interstate legal and political conflicts that remain unresolved to this day. Inside this cauldron boils a murky stew of common-law comity questions, state statutory interpretation questions, and even federal constitutional questions involving the Full Faith and Credit Clause and the Dormant Commerce Clause.

Some have pointed to the purported role of comity in this space. Sovereign nations have often seen fit to recognize one another's notarizations as a matter of comity and self-interest. In the medieval and early modern world, notarial acts were generally recognized across the countries of Europe, often under the customary commercial rules commonly known as the "Law Merchant," for a primary purpose of notarial acts was to permit a document drawn up or signed in one location (say, in London) to be used to undertake or enforce obligations in another (perhaps Amsterdam or Genoa). The reasons for this were practical and prudential, in that merchants conducting business in far-flung locales lacked other feasible means of authenticating documents as the genuine acts of the purported signatory. A notary's seal was strong evidence that the "right" person signed the document, that the document was freely adopted and legally binding, or that an authenticated copy of a document truly represented the original. And so the custom arose that one nation would recognize the notarizations of another in order to keep the trade routes flourishing. In England, these customs of merchants slowly but eventually became "fused" to the common law by the mid-19th century, when courts effectively gave them the effect of binding rules of law.[125]

[125] However, the process of fusion remains obscure to this day. *See* J.H. Baker, *The Law Merchant and the Common Law before 1700*, 38 CAMB. L. J. 295 (1979). It should immediately be pointed out, however, that the theory or conception of the Law Merchant as a uniform body of law based in custom has been persuasively challenged. Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012); idem, *The Medieval Law Merchant: The Tyranny of a Construct*, 7 J. LEGAL ANALYSIS 251 (2015).

Some have therefore contended that these centuries of history and practice of extending "full faith and credit" to notarial acts across the nations of Europe and their New World descendants are the foundation of notarial interstate recognition to this day. *It cannot be emphasized too strongly that this tale is largely bad history, and it is certainly bad law.* As is the case with the origins of acknowledgments, it is American history that drives notarial history—not the other way around. Indeed, as a general matter,[126] the "Law Merchant" has nothing at all to do with the most important and ubiquitous notarial act today, the acknowledgment.

1. History of comity statutes

As explained in section I.B above, deed acknowledgments are a creature of *real property law* and are of *statutory origins*. When the states in early American history wanted to extend interstate recognition, they therefore could not rely on prior custom but instead had to pass new laws. And because acknowledgments and notarial law were of completely different origins, it is not surprising that the earliest interstate recognition statutes had nothing whatsoever to do with notaries. Instead, they only addressed acknowledgments taken by judges, city mayors or aldermen, or justices of the peace. Even after notaries were permitted by new statutes to take acknowledgments beginning in the 1820s, no state considered the principles of notarial law to affect the question of interstate recognition of acknowledgments. As discussed below, for more than a century (from 1865 until 1968) every single attempt to create model and uniform interstate recognition statutes was addressed solely to acknowledgments of deeds and written instruments affecting lands.

[126] There may be some residual commercial or common law basis for the interstate recognition of ship protests, for example, but these exceptions to the rule are few and analogically inapt.

By the middle of the 19th century, many states had adopted some form of interstate recognition provision specific to acknowledgments, but there were numerous variations between the states. For example, under Illinois law an acknowledgment could be taken in any manner and by any officer authorized by the laws of another state, provided that a certificate of conformity was attached by a clerk of a court of record of that state.[127] This is an example of *conditional* comity or the once-common "trust-but-verify" approach to interstate recognition; comity was extended, but there must be some further proof of the officer's authority or proof that the laws of the other state were followed.[128] On the other hand, Virginia required *two* justices of the peace to take an out-of-state acknowledgment, without any regard as to the requirements for a valid acknowledgment of the jurisdiction where it was taken.[129] In other words, this was not comity but rather its opposite: Virginia was imposing *its* requirements on acknowledgments performed

[127] ILL. REV. STAT. (1845), c. 24, § 16 ("Deeds . . . before they shall be entitled to record, shall be . . . acknowledged or proved before one of the following officers, to-wit: . . . *Second*, when executed and acknowledged or proved without this State and within the United States or their territories, or the District of Columbia, in conformity with the laws of such State, territory or District: *Provided*, That any clerk of a court of record, within such State, territory or District, shall, under his hand and the seal of such court, certify that such deed or instrument is executed and acknowledged or proved in conformity with the laws of such State, territory or District . . . (emphasis in original)").
[128] The "trust-but-verify" approach to interstate recognition requires another state official—usually either a clerk, judge, or the state commissioning official—to attach a sealed "certificate of authority" (certifying that purported notary actually holds the office of the notary) or a "certificate of conformity" (certifying that the notarial act complies with the law of the commissioning state). The "certificate of authority" approach is similar to an apostille as authorized for foreign-country notarizations under the Hague Convention (CONVENTION OF 5 OCTOBER 1961 ABOLISHING THE REQUIREMENT OF LEGISLATION FOR FOREIGN PUBLIC DOCUMENTS). It was part of the original uniform notarial law, the Uniform Acknowledgment of Written Instruments Act §§ 4–5 (Unif. Law Comm'n 1892). The "certificate of conformity" concept still exists in New York law. N.Y. REAL PROP. LAW § 299-a.
[129] VA. REV. CODE (1819), c. 99, § 7 ("Any deed may, in like manner, be admitted to record upon the certificate under seal of any two justices of the peace for any county or corporation within the United States, or any territory thereof, or within the district of Columbia, annexed to such deed, and to the following effect, to wit: [form of certificate]. . ."). However, no certificate of authority from the other state was required, which could create uncertainty over the precise nature of the office held by the notarial officer of the other jurisdiction. In one case, the Supreme Court of Appeals of Virginia (as the state's supreme court was known prior to 1970) held that a certificate of acknowledgment taken by two New York City aldermen, and stating their titles as such, was sufficient under this statute. *Welles v. Cole*, 47 Va. 645, 661–62 (1849) ("The presumption is thus warranted, that aldermen of a city or corporate town, in any part of our confederacy, are justices of the peace, when they undertake to act as such *under the authority of our statute* . . . . (emphasis added)").

in other states. Because of these and similar inconsistent approaches, what was desperately needed was uniformity.

Into this environment entered one David Dudley Field II (1805–94). A prominent New York lawyer, Field believed that American law had grown too scattered, particularly in regard to procedural matters. Field became a passionate proponent of redrafting much of American law into simplified and consistent code. Field is most famous and celebrated for his 1848 Code of Civil Procedure for New York, which was the first time anywhere that common law and equity were fused into a single system.[130] (This highly influential work is what became popularly known as the "Field Code.") Less well known but still influential was Field's proposed Civil Code, completed in 1865, which attempted to codify New York's huge and disparate body of substantive civil law into a single comprehensive scheme. Although New York never enacted the Civil Code, in 1872 California did so, and from there its influence extended to many other states (particularly in the American West).[131]

With respect to interstate recognition of acknowledgments, Field's Civil Code § 518 was essentially a codified redraft of an 1848 New York statute. It reads, in relevant part:

> The proof or acknowledgment of an instrument may be made without the state, but within the United States, and within the jurisdiction of the officer, before: . . .
> 4. Any other officer of the state or territory *where the acknowledgment is made*, authorized by its laws to take the proof or acknowledgment . . . .[132]

[130] Field's influence extended back to England where he was invited to give a lecture tour in the 1850s, leading, albeit indirectly, to England's own fusion project through the Judicature Acts of 1873–75. On Field's influence in England, see Michael Lobban, *Henry Brougham and Law Reform*, 115 ENG. HISTORICAL REV. 1184, 1211–12 (2000) ("by far the greatest influence [on England's fusion movement] came from the state of New York"); Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II*, 22 LAW & HIST. REV. 565, 584 (2004).

[131] In particular, Field's brother had become a prominent lawyer and later a justice of both the California and United States Supreme Courts, thus helping spread the influence of the Field Codes. On the Civil Code and its role in the failed 19th-century attempt to erect a Continental-style civil-law jurisprudence in place of the common law of civil obligations, *see* Bartholomew Lee, *The Civil Law and Field's Civil Code in California—a Note on What Might Have Been*, 5 WESTERN LEGAL HIST. 13 (1992).

[132] COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 518, at 154–55 (1865) (emphasis added). Section 518 was a combination of several previous statutes, which also dealt with out-of-state

Although it has been modified over time (including to specify "notary public" as an authorized officer) this law remains largely unchanged on the books in New York[133] and California[134] and has been adopted in substance by Connecticut,[135] Florida[136] and Hawaii[137] as well. It also highly influenced the wording of the 1892 Uniform Acknowledgment of Written Instruments Act ("UAWIA"), still in effect in Massachusetts[138] and Louisiana,[139] as well as the 1938 Uniform Acknowledgments Act ("UAA"), which remains the law in Arkansas.[140]

The later versions of the uniform notarial laws took a slightly different approach to interstate recognition. In particular, they abandoned the language of acknowledgments being "made" in another state in favor of a new formulation: interstate recognition will be granted to notarial acts "performed in" other states. The first uniform law to adopt this alternative language was the 1968 Uniform Recognition of Acknowledgments Act ("URAA"),[141] and the formulation continues in both 1983's ULONA[142] and its successor, the Revised Uniform Law on Notarial

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acknowledgments taken by federal and state judges, city mayors, and New York commissioners of deeds. New York's catch-all provision for "other officers" (which was later revised by many states specifically to include notaries public) required a "certificate of authority" under seal by "the clerk and register, recorder, or prothonotary of the county in which such officer resides, or of the county or district court or court of common pleas thereof." N.Y. Laws 1848, c. 195, *amended by* N.Y. Laws 1856, c. 61, § 2. The Field Civil Code included this "trust-but-verify" approach requiring a "certificate of authority." COMMISSIONERS OF THE CODE, THE CIVIL CODE § 528, at 157.

[133] N.Y. REAL PROP. LAW § 299. Technically, New York's enactment of the Real Property Law in 1896 repealed the prior 1848 law, but it also combined and redrafted the state's interstate recognition statutes in a manner extremely close to the version in the Field Civil Code of 1865. N.Y. REAL PROP. LAW § 249 (1896). *See also* EDGAR LOGAN, THE REAL PROPERTY LAW OF THE STATE OF NEW YORK § 249, at 94–95 (1896).

[134] CAL. CIV. CODE § 1182.

[135] CONN. STAT. ch. 821 § 47-5a (although Connecticut has also adopted the UAA, *id.* at ch. 6 § 1-30 *et seq.*, and the URAA, *id.* at ch. 8 § 1-57 *et seq*., which would thus serve as alternative bases for the recognition of out-of-state notarial acts).

[136] FLA. STAT. § 695.03.

[137] HAW. REV. STAT. § 502-45.

[138] MASS. GEN. LAWS ch. 183 § 30.

[139] LA. REV. STAT. tit. 35, § 513.

[140] ARK. CODE § 16-47-203. It seems also to have influenced the non-uniform interstate recognition law in MISS. CODE ANN. § 89-3-9.

[141] Uniform Recognition of Acknowledgments Act § 2 (Unif. Law Comm'n 1968).

[142] Uniform Law on Notarial Acts § 4.

Acts ("RULONA"), most recently amended in 2018.[143] The other significant innovation of these later uniform laws is that, for the first time, they applied interstate recognition to other kinds of notarizations besides acknowledgments. Instead they took the amorphous practices that had over the centuries accreted around the office of notary public and applied to them the catch-all legal term "notarial act." With this fateful step all official acts of notaries—acknowledgments, verifications (jurats), signature witnessing, noting protests, certifying copies, and other customary official acts—were placed on the same level and accorded interstate recognition. It was thus only in the second half of the 20th century that the fusion of acknowledgment law and notarial law may be said to have been completed.

2. Statutory construction debates

Trying to fit a remote notarization into the text of these laws is difficult. Laws based on the Field Code address the situation where an acknowledgment is "made" in another state and in the territorial jurisdiction of the notary public. This distinction is crucial: in precise and technical terms an acknowledgment is "made" by the principal (document signer) and "taken" by the notary. These laws therefore on their face only apply where the signer is outside the "receiving state" and in the same state as the notary taking the acknowledgment. Because it was written at a time when it was impossible for the notary and the principal to be in different places, the Field Civil Code and its progeny did not conceive of a situation in which the principal and notary could be in separate states. Furthermore, these statutes still require the principal making the acknowledgment to appear "before" the notarial officer taking it. As explained in section II.B above, this language has always historically been construed to require the principal's physical

[143] Revised Uniform Law on Notarial Acts § 11 (Unif. Law Comm'n 2010; 2018).

presence with the notary. Attempting to cram the 21st-century square peg of "interstate recognition of remote notarizations" into the 19th-century round hole of these dusty texts requires unnatural contortions of both peg and hole.

The textual changes wrought by the URAA, ULONA, and RULONA fare somewhat better, but still leave several questions unanswered. First, and most notably, the catch-all term "notarial act" refocused the textual inquiry from the signer to the notary: as stated above, any notarial act that is "performed" by a notary while being located "in" State Y (the "sending state") is now entitled to recognition in State X (as the "receiving state"). The new inquiry on the *performance* by the notary is embodied in the definition of "notarial act," which includes such acts as "*taking* an acknowledgment" and "*administering* an oath or affirmation." This reorientation of the question provides a facially stronger textual argument in favor of extending interstate recognition to remote notarizations: the notarial act is necessarily performed "in" wherever the notary happens to be. Provided the notary is physically located within the geographic boundaries of the commissioning state—as is required by every state's remote notarization law (with the notable exception of Virginia, as discussed above)—then the URAA, ULONA, and RULONA would arguably be broad enough to encompass recognition of remote notarizations.

On the debit side of the ledger, each of these later uniform laws still imposes a requirement that the principal "appear before" the notary at the time of the notarial act, meaning physical presence. Each law further imports this language into its recognized forms for notarial certificates. And, as discussed with "telephone notarizations" above, in many states the consequence of not being in the notary's physical presence is to make the notarial act void, or at least voidable (through impeachment of the notary's certificate). This suggests that a secondary

inquiry must be made, namely, whether under the laws of State X as the "receiving state" the lack of personal appearance results in a void or voidable notarial act. Under the common law of some states and under RULONA, the answer is a clear "no": the failure to "appear before" the notary will not void the notarial act.[144] In most states, however, the answer is less certain.

Another textual conundrum haunts these uniform laws when applied to remote notarizations. Since 1892's UAWIA, each version of the uniform law provides that State X will give the "same effect" to notarial acts performed by notaries in State Y. The meaning of this phrase is perhaps not immediately evident. It was intended to address a shortcoming—or rather an assumed but unstated legal consequence—that was embedded in the Field Civil Code and related state laws. Under that earlier model law, the legislature of the "receiving state," or State X, says that a principal "may" make an acknowledgment before a notary of State Y if the principal is in State Y. Clearly, this is not a *grant of authority* by the legislature of State X to notaries in State Y, over whom State X has no power. Rather, this language merely stands for an implied legal consequence; it means that State X will *treat as valid* any acknowledgment made before a notary of State Y *as if the principal had made the acknowledgment before a notary of State X*. When the Uniform Law Commissioner for New York, William L. Snyder, addressed the American Bar Association in 1892 on the need for uniformity amongst state acknowledgment laws, he proposed to codify and extend this rule of legal equivalency:

> The rule [to be] adopted is that a deed, mortgage, or power of attorney, or other instrument affecting lands within the State, executed without the State, if acknowledged

[144] *In re Williams*, 213 W.Va. 780, 584 S.E.2d 922 (2003) (rejecting rule of strict compliance as a test of validity of notarial acts and instead limiting inquiry to (i) "harm" caused, (ii) "improper benefit" obtained by the notary, or (iii) lack of authority of purported notary); *Torrealba v. Kesmetis*, 124 Nev. 95, 107–08, 178 P.3d 716, 725–26 (2008) (adopting the *Williams* test). This "modern" test of validity is codified in RULONA § 26 and in all states adopting this latest uniform law.

> or proved in conformity with the law of the State or country where executed, shall be deemed validly executed as if made within the State and in conformity with its laws.[145]

Under a regime of interstate recognition based upon deemed equivalence of validity, however, the legal consequences of a valid acknowledgment still must be determined solely by reference to the laws of the "receiving state," or State X. For example, whether a duly acknowledged document is entitled to be recorded; whether it makes the document admissible into evidence without further proof; or whether the acknowledgment is a condition to the validity or effectiveness of the document itself (such as with certain powers of attorney)—all of this must be determined by reference to the laws of the "receiving state." That is what the uniform laws mean when they provide that State X will give the "same effect" to notarial acts performed in State Y as it does to its own notarizations. So far so good.

But an ambiguity arises when we are talking about remote notarizations. If a remote notarization is a legal nullity when performed by a notary of State X, because it has yet to authorize RON, then giving the "same effect" to remote notarizations performed under State Y's law would make them a legal nullity too, at least for purposes of State X's laws. And this would hold even if State Y had authorized its notaries to perform remote notarizations. The "same effect" language may thus be read to provide the exact opposite result from its intended purpose. It could be read to *invalidate* remote notarizations performed under State Y's laws for purposes of State X's laws—at least where State X had not itself authorized remote notarizations—whereas the Uniform Law Commission clearly intended the question of validity (as opposed to effect) to be determined solely by reference to the laws of State Y, the "sending state."

In sum, the existing body of interstate recognition laws adopted across the U.S. does not provide a serviceable answer to the questions raised by remote notarization. These laws were all

[145] Note in 35 CENTRAL L. J. 299 (1892) (untitled note without author indicated).

drafted and enacted at a time before the internet or webcams were invented. Their texts provide ambiguous answers at best. And, crucially, no court has ever construed any of them as applying to remote notarizations. This conundrum has led many to point to alternative bases for interstate recognition based on the supreme law of the land: the U.S. Constitution.

3. Constitutional debates

Over the past few years, some have passionately argued that the Full Faith and Credit Clause (the "FFCC") provides a basis for interstate recognition of remote notarizations. The FFCC reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." [146] The argument is that interstate recognition is a constitutional mandate; any contrary law of State X rejecting a remote notarial act performed under the laws of State Y is simply unconstitutional.[147]

One flaw in the argument is that no federal or state court over the past 231 years has ever held that the FFCC applies to notarial acts.[148] In no small part that is because the FFCC's

[146] U.S. CONST. art. IV, § 1, cl. 1.

[147] NATIONAL NOTARY ASSOCIATION, *The Enduring Benefits of Interstate Recognition of Notarial Act Laws* 5 (arguing that state interstate recognition laws over the past two centuries have been enacted only because "most people would not instinctively look to the U.S. Constitution" and that, if they did, the phrase "notarial acts" does not exist in its text); *see also Amicus Curiae Brief of the National Notary Association in Support off Plaintiffs-Appellants' Cross-Application for Leave to Appeal*, at 6, *Apsey v. Mem'l Hosp.*, 477 Mich. 120, 730 N.W.2d 695, 2007 Mich. LEXIS 952 (Mich. 2007) (arguing for the applicability of the FFCC to notarizations).

[148] In *Pierce v. Indseth*, 106 U.S. 546, 549 (1883), the Supreme Court held that the seal of a Norwegian notary entitled the certificate of a protest to "full faith and credit" because notaries are "officers recognized by the commercial law of the world." In other words, this was not a case that hinged on the FFCC requiring states to give each other's "public Acts" (statutes) legal effect, but rather one decided on the basis of the "Law Merchant" applicable to notaries. The FFCC has been cited in holding that sister states cannot inquire into *qualifications for office* of notaries in other states. *Nicholson v. Eureka Lumber Co.*, 160 N.C. 33, 75 S.E. 730, 731 (1912) (accepting a notarial act by a woman notary public commissioned in Texas). A number of 19th-century state cases also assert that notarial certificates are entitled to "full faith and credit," but only to mean what we do today by calling them self-authenticating (admissible as evidence without further foundation) or that they are entitled to certain presumptions (*e.g.*, that they cannot be impeached through parol evidence). *See*, *e.g.*, *Jamison v. Jamison*, 3 Whart. 457, 469 (Penn. 1838). One general rule was that "full faith and credit" was due to protests of bills in foreign countries, but that domestic notarial protests are entitled only to a rebuttable presumption or were not self-authenticating unless the

reference to "public Acts"—that is state statutes such as those authorizing notarial acts—has never been applied literally by the courts, and is riddled with exceptions.[149] In particular, the Supreme Court has articulated a broad "public policy exception" to the literal command of the FFCC. This "public policy exception" has roots in early American history when Chancellor Kent and Justice Story articulated the decisively influential view that "repugnant" foreign laws were not entitled to recognition because principles of comity should not be allowed to interfere with a state's interests and policies.[150] It is not difficult to articulate why overturning centuries of statutory law and case law requiring "personal appearance" and specifying what it entails in order to give documents legal effect is a matter of public policy. The mere fact that just over half the states have enacted remote notary legislation to date (and thus, a little less than half of the states have not) is sufficient to show that there is a continued divergence of public policy on the topic.

Another barrier to reliance on the FFCC is the so-called "land taboo," the doctrine that courts should apply the law of the situs in determining titles to real property. This doctrine suggests that, as a matter of constitutional law, a state's own laws—including its interstate recognition acts and its recording acts—are the sole source for determining the validity of an acknowledgment as it affects title to real property in that state. In other words, the FFCC may be doctrinally irrelevant where title to land is involved. Indeed, in the one and only case known to the authors in which the FFCC was argued to apply to notarial acts, the argument was roundly

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notary was deceased. *Spence v. Crocket*, 64 Tenn. 576, 578–79 (1875); *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 664–65, 13 S.E. 98, 99 (1891). These cases do not implicate the FFCC of the U.S. Constitution.

[149] By contrast, the applicability of the Clause to *court judgments* ("judicial proceedings") has been recognized by the courts in numerous cases over the past two centuries. For the argument that the first part of the Clause was originally understood merely as a rule of evidence, *see* Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009).

[150] ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS (1992). For a recent overview of the history of this jurisprudence, *see* Elizabeth Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L. J. 639, 651–55 (2013).

rejected by the U.S. Supreme Court because of the "land taboo." In *Hood v. McGhee*[151] Justice Holmes tossed aside the argument that Alabama was required to recognize an adoption performed by notarial act in Louisiana with his typical pithiness: "Alabama is the sole mistress of devolution of Alabama land by descent."[152]

Finally, the two centuries of activity of states passing interstate recognition laws provides strong evidence that these laws were *necessary.* The very first uniform law ever adopted by the Uniform Law Commission in 1892 dealt with the question of interstate recognition of acknowledgments because it was seen as both necessary and an area where uniformity was most strongly needed.[153] The future Chief Justice Rehnquist put this point succinctly when he was chair of the 1968 committee for the URAA. He frankly stated that the uniform law would "require the recognition of a number of notarial acts performed outside the state that were presumably not previously required to be recognized in this state."[154] Why would any of this activity by ten generations of lawyers—including a future Chief Justice of the United States—have been necessary if the Constitution mandated interstate recognition of notarial acts beginning in 1789?

With the Full Faith and Credit Clause thus called into doubt, others have argued that the Dormant Commerce Clause ("DCC") provides an independent rationale for mandating acceptance by states of other states' notarizations. As a reminder, the DCC is the "'negative' aspect of the Commerce Clause [that] prohibits economic protectionism—that is, regulatory

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[151] 237 U.S. 611 (1915).
[152] *Id.* at 615. *See also* Moffatt Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 STAN. L. REV. 1299, 1316–17 (1966).
[153] Prior to the adoption of the UAWIA in 1892, there were only seven states that had adopted roughly uniform laws on the subject and provided comity based on acceptance of other states' laws as the criterion of validity: Ohio, Illinois, Kansas, Louisiana, Nebraska, Oregon and Wisconsin. *See* note in 35 CENTRAL L. J. 299 (1892).
[154] National Conference of Commissioners of Uniform State Laws, *Proceedings: Uniform Recognition of Acknowledgments Act* 47 (July 25, 1968).

measures designed to benefit in-state economic interests by burdening out-of-state competitors."[155] This argument is facially attractive, for stopping the free flow of deeds and mortgages across state lines would significantly impede commerce in both real estate and related personal property.

But the attraction is no more than skin-deep. First, as the Supreme Court has stated, "To determine whether a law violates this so-called 'dormant' aspect of the Commerce Clause, we first ask whether it *discriminates on its face* against interstate commerce."[156] Nothing in any existing notarial acknowledgment law in any state of which we are aware explicitly stops notarized documents from traveling across state lines.[157] There simply is no colorable argument for facial discrimination in any of these statutes. Indeed, as we discuss above, the statutes in question were largely written decades before anyone even thought of the internet or the remote notarization Interstate Recognition Question. It is quite impossible for a statute to be "*designed* to benefit in-state economic interests"[158] when the very thing purportedly being designed against was inconceivable at the time of the statute's drafting. Arguing that decades-old or even century-plus-old notarial acknowledgment statutes were *designed* to keep out remote notarizations from sister states requires believing that the drafters of those statutes were clairvoyants who correctly predicted the 21st-century future.[159]

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[155] *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).
[156] *United Haulers' Assoc. v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 550 U.S. 330, 338 (2007) (emphasis added).
[157] Formerly Iowa did, but no longer. IOWA CODE ANN. § 9B.11(4) (RULONA § 11) states that, in order to be entitled to recognition in Iowa, "The notarial act performed in another state must be performed in accordance with section 9B.6" (RULONA § 6 requiring "personal appearance"). Prior to July 1, 2020, the definition of "personal appearance" in IOWA CODE ANN. § 9B.2(10) expressly excluded "appearances which require video, optical, or technology with similar capabilities." This exclusion has since been revised to include an exception for remote appearances "as provided in section 9B.14A" (RULONA § 14A). *See* S.F. 475 (2019), 2019 Acts, ch. 44, §2, 11. By this tortuous route, Iowa no longer excludes remote notarizations from interstate recognition.
[158] *See Limbach*, 486 U.S. at 273 (emphasis added).
[159] And even assuming *arguendo* that these statutes somehow *do* constitute "clairvoyant discrimination" from behind the veil of time, the DCC's broad *per se* rule against impeding commerce contains an exception for protecting legitimate local purposes that cannot be adequately protected by other means. For example, Maine was permitted to

Second, the Supreme Court has declared that those situations where there is no facial or intentional discrimination "are properly analyzed under the test set forth in *Pike v. Bruce Church, Inc.*, which is reserved for laws 'directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.'"[160] And "[u]nder the *Pike* test, [the Supreme Court] will uphold a nondiscriminatory statute . . . 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'"[161] Even assuming *arguendo* that statutes written many decades before the invention of remote notarization pose a burden on interstate commerce, it's hard to see that burden as "excessive" compared to the property host state's interest in having notarized records that the host state trusts. In any event, the DCC argument remains merely speculative, and insofar as we are aware, no court has even entertained it as of this writing.

4. The (vetoed) Interstate Recognition of Notaries Act

The final nail in the coffin of arguments contending that comity principles, the Full Faith and Credit Clause, or the Dormant Commerce Clause mandate the interstate recognition of remote notary acts comes from an unlikely source: Congress. In the midst of the Great Recession of the late 2000s and early 2010s, the spate of bankruptcies and foreclosures gave rise to a litany of arguments about paperwork mills and notarial inadequacies, raised by bankruptcy trustees, debtors-in-possession, and desperate borrowers. Perhaps few examples are more famous than the

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prevent the importation of bait fish in order to protect its waters from invasive species. *Maine v. Taylor*, 477 U.S. 131 (1986). There is certainly a colorable argument that the host state's interest in having notarized documents that it can trust meets this test, but all remains speculation at this point.

[160] *United Haulers' Assoc.*, 550 U.S. at 346 (internal citations committed; quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

[161] *Id.* (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

Linda Green "robosigning" affair.[162] These technical arguments about arcane notarial minutiae had begun to clog up the courts, further deepening the economic chill that had swept the nation.

In September 2010, both houses of Congress passed House Resolution 3808, the Interstate Recognition of Notaries Act of 2010 (the "IRON Act"), and sent it to the desk of the President.[163] An initiative of Rep. Robert Aderholt (R-Ala.) and later supported by the National Notary Association, this bill had been percolating in Congress for five years before it was finally passed by both houses.[164] Its perceived need was several high-profile episodes where out-of-state notarizations were rejected by lower courts.[165] The entire text of this legislation fit on one page. It is so short that its two substantive provisions are worth recounting below in full:

> SEC. 2. RECOGNITION OF NOTARIZATIONS IN FEDERAL COURTS.
>
> Each Federal court shall recognize any lawful notarization made by a notary public licensed or commissioned under the laws of a State other than the State where the Federal court is located if—
>
> (1) such notarization occurs in or affects interstate commerce; and
> (2)(A) a seal of office, as symbol of the notary public's authority, is used in the notarization; or
> (B) in the case of an electronic record, the seal information is securely attached to, or logically associated with, the electronic record so as to render the record tamper-resistant.
>
> SEC. 3. RECOGNITION OF NOTARIZATIONS IN STATE COURTS.
> Each court that operates under the jurisdiction of a State shall recognize any lawful notarization made by a notary public licensed or commissioned under the laws of a State other than the State where the court is located if—

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[162] *See, e.g.*, Ryan Chittum, *NYT: Criminal Charges in the Foreclosure Scandal*, COLUM. JOURNALISM REV., Feb. 7, 2012, https://archives.cjr.org/the_audit/nyt_criminal_charges_in_the_fo.php (last visited Aug. 30, 2020).
[163] H.R. 3808, 111th Cong. (2009), *available at* https://www.congress.gov/bill/111th-congress/house-bill/3808/actions (last visited Aug. 30, 2020).
[164] It was originally introduced in 2005 as H.R. 1458, 109th Cong. (2005), *available at* https://www.congress.gov/bill/109th-congress/house-bill/1458/actions (last visited Aug. 30, 2020), and reintroduced in 2007 as H.R. 1979, 110th Cong. (2007), *available at* https://www.congress.gov/bill/110th-congress/house-bill/1979/actions (last visited Aug. 30, 2020). These earlier efforts passed the House but stalled in the Senate.
[165] For example, in *Apsey v. Mem'l Hosp.*, *supra* n.147, the Michigan Supreme Court overturned a state court of appeals decision that required an additional authentication (certificate of authority) before admitting a notarized affidavit into evidence. This case should have been an uncontroversial matter of simple statutory construction. Ultimately, and correctly, Michigan's enactment of the URAA was held to be an alternative basis for recognition to an older, more cumbersome "trust-but-verify" statute that remained on the books.

> (1) such notarization occurs in or affects interstate commerce; and
> (2)(A) a seal of office, as symbol of the notary public's authority, is used in the notarization; or
> (B) in the case of an electronic record, the seal information is securely attached to, or logically associated with, the electronic record so as to render the record tamper-resistant.[166]

Although it arguably did not cover state real estate recording statutes, this simple piece of legislation would have at least required state and federal courts to give equal evidentiary status to out-of-state notarizations as to those performed in state.[167] However, the President vetoed the bill on October 8, 2010. The President's veto message stated: "It is necessary to have further deliberations about the possible unintended impact of H.R. 3808, the 'Interstate Recognition of Notarizations Act of 2010,' on consumer protections, including those for mortgages, before the bill can be finalized."[168] Congress was unable to override the veto.[169]

Clearly, if it were already the case that all states were required to recognize the notarizations of a sister state—whether by principles of comity, the Full Faith and Credit Clause, the Dormant Commerce Clause, or any other reason—then the IRON Act would have been a

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[166] H.R. 3808, 111th Cong. (2009), *available at* https://www.congress.gov/bill/111th-congress/house-bill/3808/text (last visited Aug. 25, 2020).

[167] The IRON Act did not squarely address the issue in the *Apsey* case, *supra* n.147, which was the need for a "clerk's certificate" or other type of certification showing the notarial officer's authority. Such an antiquated "trust-but-verify" requirement was abolished by the URAA § 2(a), ULONA § 4(d), and RULONA § 11(c), which state that the signature and title of listed notarial officers (including notaries public) *conclusively* establish those officers' authority: since it is impossible to disprove that officers bearing the listed titles lack authority, no additional certification proving that authority can be required. On the other hand, the only condition to recognition under the IRON Act was a "seal of office" of the notary public on the document; the open question is whether this was a necessary or sufficient condition. It is also not immediately clear that Congress's directing a state or federal (*e.g.*, bankruptcy) court to "recognize" an out-of-state notarization means that those courts must hold that they are duly performed for purposes of in-state recording statutes, where the controlling question is whether they are proper for purposes of the situs state's laws. In other words, the IRON Act's text and its legislative history support a narrow reading that it only would have applied as an overlay to state and federal *evidence rules*, and not *recording acts* or other laws requiring notarizations for valid and effective instruments. Finally, it is not clear why Congress's authority to direct federal courts was limited to the reach of its Commerce Clause powers instead of the full extent of its authority over Article III courts.

[168] 156 CONG. REC. H7402 (daily ed. Nov. 15, 2010) (veto message of President Obama), *available at* https://www.congress.gov/111/crec/2010/11/15/CREC-2010-11-15-pt1-PgH7401-9.pdf (last visited Aug. 30, 2020).

[169] H.R. 3808, 111th Cong. (2009), *available at* https://www.congress.gov/bill/111th-congress/house-bill/3808/actions (last visited Aug. 30, 2020).

pointless exercise. The mere fact that Congress attempted to take action to resolve the debates about interstate notarial recognition discussed above shows that the issues were real. The fact that the IRON Act was vetoed means that these unresolved debates continue to this day. And in this environment, other states began to take an interest in the concept of remote notarization.

5. Recognizing "defective" notarizations

Before we turn to the post-Virginia evolution of remote notarization laws, it is worth mentioning another key aspect of the foregoing discussion. In many states, there is statutory law or case law that might save an otherwise-doomed remote notarization that crosses state lines on principles *other than* comity. First, many courts have adopted various rules of law requiring a high showing of harm before a party can successfully challenge a facially valid notarial act. Some courts put it in terms of a "patent" versus "latent" defect in the notarial certificate, with the latter often difficult or even impervious to challenge. Relatedly, many states have adopted some form of "curative" act—technically, almost always in the form of a statute of repose[170]—that prevents challenges to otherwise defective acknowledgments after documents have been accepted for recording under the state recording act. At bottom, however, although these savings doctrines and statutes might play a significant role in litigation in specific states, the lack of uniformity of law across the country means that they play merely an ancillary role to the broader topic of comity discussed above. And because they vary tremendously from state to state and have, to our knowledge, not yet been invoked in the context of litigation over remote notarizations, their application in any particular state remains speculative.

[170] That is, these laws create an absolute bar to causes of action and prevent them from accruing after the occurrence of some specified event *other than* any injury itself (*e.g.*, the recording of a document with the county recorder or some passage of time thereafter). In this sense, they are broader and more absolute than a statute of limitations. *See generally*, 54 CORP. JUR. SEC., LIMITATIONS OF ACTIONS § 6 (2020).

There is a massive body of case law across U.S., reaching back to the beginning of the country's history, addressing the question of whether a facially valid acknowledgment will provide constructive notice to third parties upon recording, notwithstanding some defect in the taking of the acknowledgment that makes it otherwise ineffective.[171] A significant portion of this law holds that an improper or invalid acknowledgment can *never* serve as the basis for constructive notice absent an applicable statute of repose.[172] However, the "general rule, as established by the numerical weight of authority" appears to come down on the other side by holding that if the defect is merely "latent"—one not apparent by looking at the certificate of acknowledgment—then the document will provide constructive notice upon recording.[173] In some states, the case law is equivocal and supports both propositions.[174]

One problem applying these concepts to out-of-state remote notarizations is that it is unclear whether they would constitute a "patent" or "latent" defect. Doctrinally, and indeed logically, a claim that a remote notarization constitutes a lack of "personal appearance" should constitute the assertion of a "latent" defect: the certificate declares that the principal "appeared

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[171] *See generally*, *Record of Instrument Without Sufficient Acknowledgment as Notice,* 59 A.L.R.2d 1299 (originally published 1958) (with analysis and cases spanning from 1801 to 2019).

[172] *Id.* at § 24[a] (citing cases from Connecticut, Indiana, Iowa, Louisiana, Maryland, and Ohio).

[173] *Id.* at § 25 (citing cases from Illinois, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Vermont, Virginia, and Wyoming). There are of course obvious exceptions for fraud, *id.* at § 24[b]; but this is not really an exception to the general rule, for in that case the underlying document is void. Likewise, if the purported notarial officer was disqualified for interest or otherwise lacked authority perform the notarial act, then that might be a basis for its invalidity. *Cf.* Revised Uniform Law on Notarial Acts § 26 (2018) (rule of validity of notarial acts, with exceptions for lack of authority and disqualification for interest). However, even in the circumstance of disqualification for interest, many of the cases cited in 59 A.L.R.2d 1299, at § 25, hold that such a "latent" defect still provides constructive notice, and RULONA § 26 does not displace any of this case law. In addition, there are other savings doctrines, such as the "de facto notary" rule for cases in which the purported officer acts under "color of authority." *See* CORP. JURIS. SEC., Notaries § 9 (2020); 58 AM. JUR. 2d NOTARIES PUBLIC § 9 (2020).

[174] *See*, *e.g.*, *In re Rice*, 126 B.R. 189, 195 (Bankr. E.D.Pa. 1991) (analyzing the case law and concluding "that the dictates of Pennsylvania law on this crucial issue are somewhat equivocal and that neither party can take comfort in unbroken precedent which supports its position"); *Martin v. Crocker-Citizens Nat. Bank*, 349 F.2d 580, 582–83 (9th Cir. 1965) (noting dicta in several California cases for upholding constructive notice of acknowledgment with latent defect); *contra Emeric v. Alvarado*, 90 Cal. 444, 479 (1891) (in dicta declaring it a "dangerous doctrine" that a certificate "good on its face" but with false material statements is sufficient).

before" a notary and the sufficiency of that *appearance*—not the sufficiency of the *certificate*—would be in dispute.[175] On the other hand, most states following the model laws require disclosure of the remote notarization in the notarial certificate.[176] Does this transform the purported defect into a "patent" one? Such an argument would be pressing the bounds of the "patent" versus "latent" defect doctrine well beyond its well-established bounds, but, again, no court has ever decided the issue.

As noted above, many states also have statutes of repose as part of their recording acts. These laws provide constructive notice of recorded documents notwithstanding certain formal defects, including defects in any required acknowledgment. However, these statutes likewise vary widely from state to state, making any generalizations impossible.[177] For example, the time period for when the statute kicks in varies tremendously, from instantaneously (at the moment of recording)[178] to decades later.[179] Some state laws appear to cure any defect in the acknowledgment while others enumerate specific defects that are cured; likewise, some refer only to defects in the certificate of acknowledgment and some to the acknowledgment

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[175] *See*, *e.g.*, *Gen. Finance Co. of La., Inc. v. Warner*, 169 So. 112 (La. Ct. App. 1936) (holding lack of personal appearance a latent defect not cured); *Ammerman v. Linton*, 279 Mo. 439, 214 S.W. 170 (1919) (no acknowledgment actually taken a latent defect that is cured); *Sanger v. Calloway*, 61 S.W.2d 988, 990–91 (Comm. App. Tex. 1933) (certificate no basis in fact when signer "never appeared before a notary public"); *Gulf Production Co. v. Continental Oil Co.*, 139 Tex. 183, 194, 164 S.W.2d 488, 493 (1942) (certificate not disclosing notary's disqualification good when "Turner and his wife actually signed the lease and appeared before a notary public and acknowledged the same").

[176] MBA-ALTA, Model Legislation § 8(4); Revised Uniform Law on Notarial Acts § 14(A)(d) (2018).

[177] For a summary and detailed classification of these statutes, *see* NANCY SAINT-PAUL, CLEARING LAND TITLES § 20:1 *et seq.* (3d ed. 2019).

[178] *See*, *e.g.*, ALA. CODE §§ 35-4-63, 35-4-72; ARK. CODE § 18-12-208; FLA. STAT. §§ 695.03(4); 765 ILL. COMP. STAT. 5/31; KY. REV. STAT. ANN. § 382.270; MICH. COMP. LAWS § 565.604; MINN. STAT. § 507.251; MISS. CODE ANN. §§ 89-3-1(2); MO. REV. STAT. § 442.240; OHIO REV. CODE ANN. § 1301.401; TENN. CODE ANN. §§ 66-24-101 and 66-24-112; UTAH CODE ANN. § 57-4a-2; WASH. REV. CODE § 65.08.030.

[179] *See*, *e.g.*, ALASKA STAT. § 34.25.010 (10 years); ARIZ. REV. STAT. § 33-401(D) (1 year); *id.* at § 33-411(C) (10 years); CAL. CIVIL CODE § 1207 (1 year); FLA. STAT. § 95.231 (5–20 years); *id.* at § 694.08 (7 years); IOWA CODE §§ 589.1 and 589.3 (10 years); KAN. STAT. ANN. § 58-2237 (10 years); MASS. GEN. LAWS ch. 184, § 24 (10 years); NEB. REV. STAT. §§ 76-258–260 (10 years); N.Y. REAL PROP. LAW § 306 (10 years); OHIO REV. CODE ANN. § 5301.0 (4 years); OKLA. STAT. tit. 16, §§ 16-27a (5 years); 21 PA. STAT. §§ 263–264 (30 years); TEX. CIV. PRAC. & REMEDIES CODE § 16.033 (2 years); VA. CODE ANN. § 55-106.2 (3 years).

generally.[180] Finally, some statutes cure the complete lack of an acknowledgment altogether, which suggests that any "latent" or "patent" defect should also be cured.[181] These statutes show that a dispute over interstate recognition of an out-of-state remote notarization will be moot in many particular cases; once a document is recorded (or once recorded for the required length of time) third parties are bound by constructive notice of it. Therefore, although these statutes have not yet been interpreted to apply to out-of-state remote notarizations, they will undoubtedly play a role in any litigation over the question.[182] There has been no attempt to make these state laws more uniform and consistent during the push to enact remote notarization laws over the past three years.

III. THE SLOW BURN

"All legislation . . . is founded upon the principle of mutual concession . . . ."
--Henry Clay [183]

After Virginia's law went into effect in July of 2012, remote notarization issues began slowly simmering underneath the surface of the real estate marketplace. Virginia's initial foray into remote notarization brought about some intense but arcane debates amongst those of us involved in this intellectual space. It also brought about some legislative interest from other

[180] *See*, *e.g.*, OHIO REV. CODE ANN. § 5301.07 ("notwithstanding any defect in the making, execution, or acknowledgment of the real property instrument"); OKLA. STAT. tit. 16, §§ 16-27a(7) ("[a]ny defect in the execution, acknowledgment, recording or certificate of recording the same"); UTAH CODE ANN. § 57-4a-2 ("any defect, irregularity, or omission in its execution, attestation, or acknowledgment").
[181] *See*, *e.g.*, ARIZ. REV. STAT. §§ 33-401(D) and 33-411(C); CAL. CIVIL CODE § 1207; COLO. REV. STAT § 38-35-106(2); D.C. Code § 42-404(a)(1); IOWA CODE § 589.3; MASS. GEN. LAWS ch. 184, § 24; MD. CODE ANN., REAL PROP. § 4-109(c)(4); MINN. STAT. § 507.251; NEB. REV. STAT. § 76-259; TEX. CIV. PRAC. & REMEDIES CODE § 16.033.
[182] It bears pointing out that statutes of repose providing *constructive notice* to third parties despite defects in an acknowledgment do not necessarily make such recorded documents valid as *self-authenticating evidence* under state or federal evidence rules, at topic which is outside the scope of this paper.
[183] *E.g.*, Robert Clay & William Giles, *Living up to Henry Clay's legacy of compromise, civility*, LEXINGTON HERALD LEADER, Feb. 2, 2015, *available at* https://www.kentucky.com/opinion/op-ed/article44551275.html (last visited Aug. 30, 2020).

states. The second legislative hat in the ring came from Montana, which took a very different tack in confronting the three key questions of remote notarization. Ultimately, while Virginia's law proved simultaneously too expansive and too vague to gain widespread acceptance in the real estate industry, Montana's proved too limiting and too prescriptive to do so either. Various real estate industry players therefore coalesced around a remote notarization law in Texas, which passed in 2017 and became a model to which other states and organizations would later look.

A. The Montana Act of 2015

In its 2015 legislative cycle, Montana passed what was state Senate Bill 306, "An Act Updating and Revising Notarial Laws."[184] Much of Montana is extremely rural and remote, and its status as one of the last frontiers means that Montanans still confront some of the difficulties that originally caused states to grant notaries the power to take acknowledgments. When it can be a multi-hour drive to find a notary, the appeal of an internet-based system that transcends travel problems becomes apparent. Montana's law appears to have been designed with the needs of a rural, know-your-neighbor body politic in mind.

Montana attempted to solve the three key questions of RON using very different approaches than did Virginia. First, as to the Location Question, Montana sidestepped the issue by limiting the availability of RON only for principals who *were residents of Montana* and for transactions involving *Montana real property.*[185] As we discuss above, the primary difficulty of the Location Question is figuring out who has jurisdiction. Montana made that easy by requiring

[184] Montana has subsequently updated its notarial laws to conform more closely to Texas and the model remote notarization laws, so the citations that follow are to the Montana law as it existed in 2015.
[185] S.B. 306, 64th Leg., § 12(3)(a) (Mont. 2015) (hereinafter "Montana S.B. 306"). In this paper, we focus on real estate issues rather than other matters encompassed by the Montana law. For example, there are limited exceptions for proxy marriages, a subject that (while extremely interesting) is beyond the scope of this paper.

jurisdictional hooks in its statute, both *in personam* and *in rem*. While this certainly avoided the legal questions that the Virginia statute had created, it also meant that the technology world and the real estate world both engaged in a collective yawn. Montana is a sparsely populated state with a small market. There was little interest in a statute that was so limiting, no matter its clarity. Investing in its use would produce little return—a subject we return to below.

Second, as to the Authentication Question, the Montana statute again took a particularly "Big Sky Country" approach: the only means available to authenticate the principal were personal knowledge of the principal by the notary, or authentication of the principal by a credible witness.[186] While this sort of "know-your-neighbor" procedure had its utility for local transactions involving local players, again the broader technology world and real estate world were uninterested in anything that was unable to scale.

Finally, as to the Interstate Recognition Question, in Montana's case, there was no such question. Because, insofar as the subject of real estate is concerned, Montana had limited the availability of remote notarization to documents involving Montana real property, the Interstate Recognition Question was moot. There was no way that a deed or mortgage involving Montana real property would find its way to being recorded in another state.[187]

In the end, while the Montana act was laudably narrow in its draftsmanship, it was largely ignored by the marketplace. The RON startups were interested only in legal regimes that allowed them to scale, and the Montana statute had the exact opposite effect. Instead, the startups continued to press their case about the purported nationwide effect of the Virginia statute, and

[186] Montana S.B. 306, § 12(3)(a).

[187] We recognize the possibility that a deed or mortgage could theoretically involve *both* Montana real property and real property in a sister state. But given the difficulties of drafting an instrument that meets two different states' laws and multiple county recorders' preferences in one document (a challenge one of your authors has personally experienced), this possible fact pattern is of little practical interest. In any event, our eight years of experience in this space has never unearthed such a document crossing our desks, which suggests that insofar as the subject of this paper is concerned, the Montana remote notarization statute was not used for anything other than Montana property.

found the Montana statute to be of little interest. This was the state of play until 2017, when Texas passed its law.

B. The Texas Act of 2017

By the turn of 2017, the *sturm und drang* of the Virginia statute was gaining greater attention in the real estate economy. In particular, as questions about Virginia RON documents increasingly crossed their desks, the in-house lawyers at both large national lenders and title insurers had grown increasingly concerned about the unanswered legal issues surrounding remote notarization as it had been instantiated in Virginia. RON issues began to appear as a topic in various industry trade association meetings and seminars. Rumblings about the potential for RON legislation had begun to appear in other states as well, most particularly Texas. The enormous geographic and economic size of Texas, together with the unsettled legal field of RON issues, brought about an inter-industry set of interest groups concerned about a statutory regime for RON in the Lone Star State. All involved recognized that the public policy choices that Texas would make on the issue would cast a huge and persuasive shadow on the issues nationwide.

As it happened, three major interest groups entered the fray: first, the lending industry, primarily through volunteers of the Texas Mortgage Bankers' Association and its national counterpart, the Mortgage Bankers' Association; second, the land title insurance industry, primarily through volunteers of the Texas Land Title Association and its national counterpart, the American Land Title Association; and finally, the technology industry, which lacked a trade association but which had individual companies who were very active in state politics.

As might be expected, the lending and land title industries found common ground in seeking a legal regime for remote notarization that was as safe as possible from both legal

challenge and fraud potential. Among other things, the lending and land title industries sought a regime that was safe from attack by bankruptcy trustees, foreclosure-defense attorneys, and other similarly situated parties who might seek to nitpick at technicalities. They also sought to create a regime with an authentication protocol that was far stronger than the prevailing "just show your driver's license" practices, which have played no small part in the disturbing amounts of real estate fraud committed in the 21st century. By contrast, the technology industry sought a RON legal regime that was as low-cost and globally scalable as possible. To this end, Texas' reputation as a premiere place to do business was of considerable interest to them. As might be expected, these two sets of interests were more or less at direct odds with one another. However, a grand compromise between the various factions was ultimately reached in the form of Texas House Bill 1217.

1. The Location Question compromise

With regard to the location question, the compromise public policy was that the principal's location is irrelevant, but that the notary must be physically located inside of Texas at the time of the remote notarial act. The relevant language was encapsulated at Texas Government Code § 406.110(a), which provides in relevant part: "An online notary public may perform an online notarization . . . regardless of whether the principal is physically located in this state at the time of the online notarization." The path to this language was long and winding, and it is more complex than it may seem on the surface.

On the one hand, the language may not appear all that different in end result from the Virginia act. Virginia likewise places no limit on the location of the principal. But the Texas law does not make any attempt to "deem" a location of a notarial act; nor does it grant Texas notaries

extraterritorial powers to perform notarial acts in other states or countries. The tug and pull that led to this language was a battle between the technology industry on the one hand, and the lending and land title industries on the other.

The technology industry had sought a "deeming" provision similar to what Virginia had created. The technology industry felt that this was the cleanest way to answer the unanswerable "where does it happen when it happens online?" question—just "deem" it to have occurred in Texas, by statute. By contrast, the lending and land title industries feared that such a provision was (as discussed above) constitutionally dubious as well as factually questionable, and that it would lead to countless legal challenges against remotely notarized documents. A single successful challenge on this front could have monumental impact, creating a precedent that would then threaten to unhinge every single document that had utilized the new remote notarization procedure.

Instead, the lending and land title industries sought a limitation that came to be called the "Texas nexus." Drawing on what Montana had done in its law, the lending and land title industries advocated for a provision requiring some type of transactional connection to the Lone Star State before a Texas notary could perform a remote notarization. As regards the subject at hand, that meant limiting RON to documents affecting real property located inside Texas. In this way, they reasoned, "where does it happen when it happens online?" doesn't matter, because the only jurisdiction that could be affected by the law would be Texas, which would of course be applying its own law to real property located inside its own borders. Given the now-unassailable legal principle that each state has the right to adjudicate issues pertaining to real property inside

its own territory,[188] the lending and land title industries viewed this as a rock-solid basis for avoiding challenges to remote notarizations involving land titles. But the technology companies resisted this approach. It is fair to conclude that they eyed the ability to use Texas as a second platform (behind Virginia) from which they could broadcast their notarizations nationwide, in an attempt to disintermediate and consolidate the U.S. notary business. A "Texas nexus" would have been fatal to this business model.

In the end, both parties gave a little ground and met somewhere near the middle. The technology industry gave up its "deeming" approach, and the lending and land title industries gave up the "Texas nexus." The upshot was that Texas remote notarizations *could* in theory affect real property in other states, since there was no subject matter limitation over the content of the notarized document. A newly minted Texas online notary could thus perform a remote notarization on a deed to Minnesota real property, for example. This particular bargain extracted more from the lending and land title industries than it did from the technology industry. It also caused the Location Question to become even more tightly bound up with the Interstate Recognition Question, as we discuss below.

2. The Authentication Question compromise

With regard to the Authentication Question, both sides of the debate found common ground in desiring clarity. The technology industry had come to understand that the Virginia approach was muddled and nearly impossible to explain sensibly, especially to a layperson. And

[188] "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." *United States v. Fox*, 94 U.S. 315, 320 (1877) (opinion by Justice Field, brother of the author of the aforementioned Field Code).

the technology industry was interested in marketing RON services as safe and secure from fraud, another area of substantive agreement with the lending and land title industries. To this end, everyone agreed that some form of multi-factor authentication was needed. Where the disagreement came was on how to implement that notion.

As explained above, there are only three ways to authenticate humans: by a *token* (something they have), a *shared secret* (something they know), or *biometrics* (something they are).[189] The most secure way to authenticate an identity is through a combination of two or more of these methods. This is what is meant by *multi-factor* authentication. The point is not simply to permit two or more of the same type of authenticators, for that would not materially increase the security of the method; if a fraudster can pass off one fake ID it would not make a material difference to ask for two. Rather, it is the cross-combination of factors that increases the strength of the authentication process.

A couple of common examples clarify how this is so. A bank ATM card is a simple form of multi-factor authentication. To use the card and withdraw money, a person must physically possess the card, and insert it into an ATM. The card is thus a token. Then, the person must supply a PIN—a classic shared secret—to access the underlying bank account. If ATM cards did not operate on the principle of multi-factor authentication, then anyone who gets possession of a card, or anyone who figures out another person's PIN, could gain access to an account. It is through the combination of the two factors, a token plus a shared secret, that makes basic security for ATM cards possible. Another common form of multi-factor authentication is used whenever a company providing online services sends a temporary PIN or passcode to a cell phone number which has been previously linked to the account; after having logged in to an

[189] *See*, *e.g.*, SPeRS, *supra* n.108, at 1-49.

account via username and password (shared secret), the person must physically possess the linked cell phone (token) and supply the code to proceed.

However, while these simple examples explain the principle of multi-factor authentication, they are both insufficient for purposes of notarial law. After all, it is fairly easy for family members to gain access to each other's ATM cards and cell phones. Even more importantly, both methods rely on a *prior* authentication by the bank or service provider; the customer's ATM card and PIN or cell phone number are distributed or shared after the account relationship has already been established, and identity confirmed. Notarizations require a much greater degree of certainty of authentication than these common examples can provide, and they must be able to occur where the notary has not conducted a prior authentication of the principal. Thus, multi-factor authentication was the agreed destination for the Texas remote notarization law, but the disagreement was in how to get there.

For the technology industry, authentication is an input cost in offering RON services. The technology industry therefore had a vested interest in performing authentications in a low-cost manner. By contrast, the lending and land title industries bear the financial risk that transactions are fraudulent, and they therefore had a vested interest in making sure that authentications were as strong and fraud resistant as possible. Strong security does not come cheaply, and compromise was again needed.

The compromise language was designed to take advantage of all three possible methods of authentication. First, something the principal has (a token) was, as a practical matter, mandatory. Although the traditional notarial option of personal knowledge remained available,[190] most notarizations do not meet this test, and authenticating most principals requires a different

[190] TEX. GOV'T CODE § 406.110(b)(1).

approach. This was accomplished through a requirement that the principal must "remote[ly] present[] . . . a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the person," and that this be subjected to something called "credential analysis."[191] In turn, "credential analysis" was defined as "a process or service operating according to criteria approved by the secretary of state through which a third person affirms the validity of a government-issued identification credential through review of public and proprietary data sources."[192]

In short, this process was an upgrade of the longstanding "show your driver's license" notarial process that had become commonplace on paper documents. By adding credential analysis to it, this process became vastly more secure. Most government-issued identification cards contain a litany of security features meant to evidence the bona fides of the credential and to enable the detection of counterfeits. The high-resolution cameras that are ubiquitous on even older smartphones can take pictures that will capture the otherwise-invisible microdots, holograms, and similar security features of these documents, which can be detected by automated software trained to look for their presence (or absence). Requiring credential analysis offered a powerful new anti-fraud tool that advanced the legitimacy of remote notarization by helping to weed out fake IDs.

But this was not the end. Credentials and credential analysis were only one factor, and recall that all parties agreed that a *multi*-factor authentication regime was needed for RON. That left a need to devise a second factor of authentication from one of the other possible categories: a

[191] *Id.* at § 406.110(b)(2).
[192] *Id.* at § 406.101(1).

shared secret (something you know) or biometrics (something you are).[193] The statute called this second factor "identity proofing."[194]

Since the technology companies had taken up their primary residence in Virginia and had been following what they perceived to be the "right" method of asking "out-of-wallet" questions[195] based on a principal's credit report and financial transaction history, they suggested this approach as a second authentication factor. This was an acceptable possibility to the lending and land title industries, but they were not satisfied with enshrining it in statute as the *only* method. One concern was about the ever-increasing number of data breaches and hacks that were making credit-type information available on the "dark web." This concern proved prescient, as only a few months later, in September of 2017, the Equifax hack resulted in nearly half of America's credit reports being made available for sale to fraudsters.[196] Instead, the lending and land title industries pointed to advancements in biometric security, foreseeing a world in which biometric identification could become commonplace.

In the end, the parties compromised on a definition of "identity proofing" that was sufficiently flexible to allow for both the then-prevailing approach of using credit-based "out-of-wallet" questions, which the technology companies preferred, as well as future biometric or other security approaches that might emerge as technology advanced. "Identity proofing" was thus defined as "a process or service operating according to criteria approved by the secretary of state

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[193] It is of course possible to have a second "something you have" factor, such as a second form of ID. However, all parties agreed that if someone was clever enough to devise a fraudulent ID that could fool credential analysis algorithms one time, they could concoct a second fake ID that would do it twice. Therefore, an authentication method from a second category was needed.

[194] *Id.* at § 406.110(b)(2)(C); *see also id.* at § 406.101(7).

[195] The idea being that, if a person's wallet were stolen, the information in it alone would not reveal the answers to the questions.

[196] *E.g.*, FED. TRADE COMM'N, *Equifax Data Breach Settlement*, https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement (last visited Aug. 30, 2020).

through which a third person affirms the identity of an individual through review of personal information from public and proprietary data sources."[197]

Importantly, the definitions of both "credential analysis" and "identity proofing" required a *third person* to validate the information. After all, just as a handwritten name tag saying "Hi, My Name Is Alice" is an essentially worthless token, having an individual "self-certify" information about his or her identity is circular and pointless: fraudsters would be more than happy to lie twice. As we discuss below in section V.A.2, this seemingly obvious point became a stumbling block over which many would trip when the Pandemic arrived three years later.

3. The Interstate Recognition Question compromise

As we discuss above in section II.C.3, nothing about remote notarization has proven more difficult than the Interstate Recognition Question. This tangled thicket of legal issues and public policy debates vexed the parties involved in the Texas bill. Both sides of the question were hotly debated, that of *exportation* (whether sister states should accept Texas remote notarizations) and *importation* (whether Texas should recognize those performed in other states). All the arguments were made, all the points were pressed, and the result was only continued debate. In the end, there was only one politically viable solution to be found: As to the exportation problem, Texas would require disclosure on the face of any remotely notarized document, so that sister states could decide for themselves whether to accept it. On the importation side of the ledger, the question was simply left unaddressed, and a compromise of silence left Texas's existing interstate recognition statute undisturbed.[198]

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[197] TEX. GOV'T CODE § 406.101(7).

[198] TEX. CIV. PRAC. & REMEDIES CODE § 121.001(b) (broadly stating that "[A]n acknowledgment . . . may be taken outside this state, but inside the United States or its territories, by . . . a notary public . . . .").

The route towards compromise on the importation question was a circuitous one. If Texas merely opened the gates to other states, then that could immediately undercut the authentication safeguards built into its own remote notarization law. Because it is just as easy for Texas consumers to jump on a webcam with a Texas notary as with one from Virginia, they could easily be routed to the less secure, and thus cheaper, alternative. This was the feared "race to the bottom" of security standards. Just as Delaware had captured the lion's share of corporate formations more than a century ago—a crown wrested from neighboring New Jersey in 1899 and which it wears to this day—either Virginia or some future, less-secure state could consolidate remote notarization business as the "Delaware of Notaries."

Various proposals were debated to prevent a "race to the bottom." One obvious solution would be to deny reciprocity explicitly. Assuming this solution did not run aground on the shoals of the Dormant Commerce Clause (as discussed above), it would at least have settled the matter for several years until more states had a chance to pass remote notarization laws, at which point Texas could reassess the lay of the land. But a "keep them all out" strategy risked backfiring, inviting similar responses from other states in a retaliatory freefall. The idea of turning the internet-based document signings of 50 states into 50 separate stovepipes would be of obvious and drastic harm to consumers, even if it was done in the name of fraud prevention.[199] It would also likely invite a vigorous federal response.

A more promising approach centered on the idea of *conditional* reciprocity: only if the sister state matched or exceeded Texas's security standards should Texas afford recognition. The problem of course was how such a mechanism would work in practice. If the statute merely announced a rule of conditional reciprocity there would be no way to determine definitively, as a

[199] What happens when people move across state lines? Would an incapacitated person's durable power of attorney be valid or invalid depending on where it is used?

factual matter, whether any other state met or exceeded Texas's standards other than through resort to the Texas courts. The idea of a hard slog of litigation with Texas judges ruling on the merits of 50 states' remote notarization laws on a case-by-case basis carried an obvious lack of appeal.

A possible alternative was to make the Texas Secretary of State the fact-finder and decision-maker. As the state commissioning official best versed in Texas's remote notarization standards, the Secretary could determine whether other states' laws passed muster, and third parties could rely on that determination as definitive for purposes of Texas law. This idea became affectionately known as a "naughty or nice list." Texas lenders, title companies, lawyers and state agencies could simply resort to an official list of states whose remote notarization laws matched those of Texas, and this objective determination would control. Soon, however, problems with this proposal became apparent. Would these determinations require official rulemaking or adjudication subject to the state's Administrative Procedures Act? Would the Secretary's decisions or determinations be subject to judicial review? Would third parties' reliance interests be protected if the "naughty and nice list" were later subject to attack? Added to these legal concerns was a political one: would the Secretary of State really want to be in the position of passing judgment on the merits of sister states' laws? With all of these open questions, the merits of returning to silence on the question of importation became obvious.

Next to be decided was the question of exportation, and the solution was simply to let other states decide. Unlike Virginia's remote notarizations, Texas remote notarizations would announce themselves through mandatory disclosure in the notarial certificate. By this time, the RON platforms had all experienced some level of resistance by the real estate industry to the acceptability of their services. As discussed above at section II.D.3, they offered a variety of

statutory and constitutional theories as to why lenders and title insurers should not be concerned. While some were easily influenced by citations to the U.S. Constitution, most lawyers were unimpressed. Some appear to have believed that by keeping the "RON *vel non*" question hidden, sooner or later the tempest would blow over, and the players in the real estate industry would simply accept all remotely notarized documents without asking questions about their provenance. At first striving against disclosure, the technology industry thus offered a variety of arguments to the effect that disclosure would somehow make remote notarization "second class" or brand it with a substandard moniker.

But given the strong authentication provisions discussed above to which everyone had just agreed, this argument lost its wind. Eventually, the technology industry changed strategy, and embraced disclosure as a marketing opportunity. Having helped to build the new regime, they wisely saw the opportunity to promote Texas remote notarizations not as "second class," but as "best in class." This change in strategy lifted the pall over interstate recognition just enough to allow the compromise; the Texas law would require all documents notarized by Texas online notaries to disclose their nontraditional nature.[200] However, Texas statutory law would *not* answer the question of whether Texas remote notarizations could flow to sister states; *nor* would Texas statutory law answer the question of whether sister states' remotely notarized documents were accepted in Texas. Instead, the status quo was left to be, all parties walked away with their respective arguments, and the issue was left to be decided in the courts.

This resolution is admittedly unsatisfying. Everyone hoped for a magic phrasing that could cut this Gordian knot, but none could be found. Indeed, none has been found since. The Interstate Recognition Question remains to this day the "third rail" of remote notarization.

[200] TEX. GOV'T CODE § 406.110(d) ("The electronic notarial certificate for an online notarization must include a notation that the notarization is an online notarization.").

History shows that every proposed approach attempting to bring clarity to the issue becomes a kiss of death, dooming any legislative effort in any state. Many a well-intentioned effort has run aground on these politically treacherous shoals. Given the nearly intractable nature of the problem, only a federal *deus ex machina* seems likely to solve the issue. We take up this subject at section V.B below.

C. The Legislative Dam Bursts

The Texas law was a breakthrough. Finally, in May of 2017, all the interested parties had devised a compromise solution that all could reasonably accept. This compromise had been enshrined into law in one of the largest states in the Union. Although the players understood the significance of the achievement, even they were taken aback by the new and quickened tempo that had been set. The dam had burst.

It was obvious that Texas would serve as a template for future legislative efforts, and indeed, just days after the Texas legislature passed H.B. 1217, the Nevada legislature followed suit with its close copy.[201] However, both of these laws were customized in the sense that they were fitted into these states' existing statutory schemes. What was needed was a more durable, all-purpose craft to navigate the torrents. What was needed was actual model legislation.

There were two previous attempts at creating model remote notarization laws that were, in retrospect, failures. In late 2016 the Uniform Law Commission had formally adopted an Amendment to RULONA[202] that authorized remote notarization on a tentative basis. It was limited to signers located outside the United States, making it of little practical utility in the vast majority of cases. It also did not require a multi-factor authentication approach, as the Texas law

[201] A.B. 413 (Nev. 2017).
[202] Amendment to Revised Uniform Law on Notarial Acts (Unif. Law Comm'n 2016) (now withdrawn).

ultimately did, instead requiring only "identity proofing" with no additional requirement for "credential analysis" or its equivalent. It did, however, include a disclosure requirement complete with sufficient model short-form notarial certificates. Although the Amendment was introduced in Minnesota,[203] it was enacted nowhere, and has since been withdrawn. The other failed model was the National Notary Association's updated Model Electronic Notarization Act ("MENA"), adopted in January 2017. This model act contained no disclosure requirement and also lacked a multi-factor authentication procedure. Also, instead of the general concept of "identity proofing," it would have enshrined two specific technologies or processes for authenticating principals into statute—dynamic knowledge-based authentication (KBA) and use of a "public key certificate"—instead of leaving the designation of specific technologies for "identity proofing" up to rulemaking.[204] Given the events of the past three years, MENA is now little more than a historical curiosity.

A note to the reader before we delve into this section III.C. We recognize that the rich detail that follows may not be to every reader's needs at the moment. We have endeavored to capture here our historical memory of how things came to be the way they are in the various model statutes, and that requires some length. Those readers who simply want "the story of remote notarization" should feel free to skip ahead to section IV. But we hope that the in-depth discussion that follows is of aid to those readers who need a deep understanding of the public policy debates that surrounded the model statutes on which many remote notary laws are now based.

[203] S.F. 893 (Minn. 2017).
[204] The Model Electronic Notarization Act § 5A-5 (Nat. Notary Ass'n 2017).

1. The MBA-ALTA Model Legislation

Because the Texas law breakthrough had been achieved largely because of the buy-in from the state mortgage bankers and land title industry, it was natural that a national model law would tap into these experiences and take shape with the Texas law at the forefront of everyone's minds. In the summer of 2017, the national Mortgage Bankers Association (MBA) teamed up with the American Land Title Association (ALTA) to begin a months-long process of debate, drafting, and sifting through voluminous feedback and comments from across the country. The final model legislation was formally adopted in December 2017.[205] It naturally bore the deep imprint of the Texas remote notarization law, now essentially redrafted in a more portable and durable form. The basic policy choices that Texas made on the Location Question, Authentication Question, and Interstate Recognition Question remained intact. At the same time, some minor problems with the Texas law were ironed out.[206]

The MBA-ALTA Model works like a plug-in. It is a self-contained module that is designed to sit on top of any state's existing body of notarial law with minimal or no required changes to prior laws. It is thus designed to be enacted in a separate chapter, section, or subtitle and works simply by appropriate cross-references to existing notarial laws. States are given the option of creating a separate notarial "commission" for remote notaries or merely permitting commissioned notaries to "register" with the state to perform remote notarizations. In theory, therefore, the MBA-ALTA Model is an easy legislative "lift." In practice, there are

[205] Model Legislation for Remote Online Notarization (Mortgage Bankers Ass'n & Am. Land Title Ass'n 2017) (hereinafter "MBA & ALTA, Model Legislation").

[206] For example, the Texas law conceives of the audio-video recording as a part of the notary's journal, but the two are really distinct notarial records created and retained in different media and file formats and possibly different locations. In addition, the Texas law requires a recording of the "audio and video conference session that is the basis for satisfactory evidence of identity," which suggest something more (the entire conference session?) or less (just the part where the notary identifies the principal?) than the notarial act itself. The Model Legislation decouples the journal from the recording and clarifies that the "notarial act" is to be recorded. *Compare* TEX. GOV'T CODE § 406.108(a)(6) *with* MBA & ALTA, Model Legislation, at § 6.

complications of organization, drafting convention, style, and even policy (*e.g.*, acceptable forms of identification for credential analysis, use of credible witnesses or interpreters, relation between a remote notary's electronic journal and any existing journal requirement) that have made no two enactments of the MBA-ALTA Model alike. Indeed, it is not too much to say that states' remote notary laws are mainly *inspired* by the MBA-ALTA Model without being literal *enactments* of it.[207]

A curious side note is that the MBA-ALTA Model Legislation was the first time the new moniker of "remote online notarization" or "RON" was used. It has now, of course, become ubiquitous. Throughout 2017 there was extensive debate about the proper terminology for this newfangled notarization process. The National Notary Association's MENA had used the term "remote electronic notarization,"[208] as did the National Association of Secretaries of State (NASS),[209] making explicit the connection between remote notarizations and IPEN, *i.e.*, the use of electronic documents and electronic signatures. By contrast, the Texas law had used the term "online notarization," foregrounding that what makes this new notarial process unique is its use of internet-based communication technologies, not the medium in which the notarial act is reduced to writing or signed. Yet the word "online" had its critics, too; it was an old term for circuitry or connected devices reborn as a neologism for the Internet (albeit now a quarter-century old), and who knows what kinds of unimagined technologies for communication might

[207] On one end of the spectrum are those states that generally follow the model and the Texas legislation, *e.g.*, TENN. CODE ANN. § 8-16-301 *et seq.* & MINN. STAT. § 358.645; while others facially bear little relation to it at all despite including each of its essential policy elements, *e.g.*, UTAH CODE § 46-1-2 *et seq*. Other states fall somewhere in between, *e.g.*, FLA. STAT. ANN. § 117.201 *et seq.* & OHIO REV. CODE § 147.011 *et seq.*, sometimes blending elements from RULONA, discussed *infra*, *e.g.*, ARIZ. REV. STAT. § 41-371 *et seq*.
[208] The Model Electronic Notarization Act, at vi–viii, ch. 5A cmt., and *passim*.
[209] National Association of Secretaries of State, *National Electronic Notarization Standards* (amended and readopted on Feb. 19, 2018).

exist decades hence?[210] The compromise hybrid of "RON" has now gained currency, although for how long it will last is hard to say given the alphabet soup of acronyms that now marks this space.[211] Its chief merit seems to be that it is an easily pronounced, single-syllable word; and its greatest demerit is that it is an unlovely acronym meaningless to all but the initiated.

2. The "papering out" puzzle

Another significant difference between Texas and the MBA-ALTA Model Legislation was that the latter invented a new process now known colloquially as "papering out."[212] Remote notarization results primarily—although, as explained below, not exclusively—in electronically signed and notarized documents. Such "native digital" documents, which were born in pixels rather than on paper, have obvious advantages to a real estate industry quickly moving to fully digital processes with all of the easier accessibility and heighted security this change entails. Their chief disadvantage, however, is that a large proportion of the country's roughly 3,600 county recorders lacks the ability to accept and record documents electronically.[213] In states that have enacted URPERA or a similar e-recording law, county recorders may accept documents *received* in electronic form, and such documents may be either "native digital" (created, signed and notarized electronically) or originally tangible documents turned into electronic form

[210] Or for that matter today. If a remote notarization is performed via an app on a 5G-connected smart phone, is it performed "online"? The answer to such a semantic question depends on whom one asks.
[211] American Land Title Association, *Notarization Types and Terminology*, *supra* n.2.
[212] In fact, Tennessee had already pioneered a similar provision in its recording laws, but it was little used and had no influence on the development of later papering-out legislation. *See* TENN. CODE. ANN. § 66-24-101(d). This provision does not permit a *notary* to make a copy certification but rather requires a licensed attorney or the document's "custodian" to make the certification and then to acknowledge the certification before a notary.
[213] The Property Records Industry Association (PRIA) maintains a list, updated monthly, of counties that accept electronic recordings in some form. As of writing, PRIA reports a total of 2,175 counties as currently enabled with electronic recording, or roughly 60% of all jurisdictions. *See* PRIA, https://pria.us/ (last visited August 30, 2020). PRIA maintains GIS map tools for in-depth information on the jurisdictional and population coverage of electronic recording. The 60% of jurisdictions in which electronic recording is enabled covers 87.3% of the U.S. population. *See* PRIA, eRecording Jurisdiction Coverage, https://hub-priaus.hub.arcgis.com/ (last visited August 30, 2020); PRIA, eRecording Population Coverage, https://hub-priaus.hub.arcgis.com/ (last visited August 30, 2020).

(usually scanned pieces of paper submitted as .PDF or .TIFF images).[214] But how is one to record a "native digital" document in a county recorder's office that cannot accept electronic recordings? A printed-off copy would not seem to suffice in many cases because states often require submitted paper documents to be "originals" or to contain "original" or "ink" signatures, or some similar formulation. There are also chain-of-custody concerns in permitting printed-off "native digital" documents to be recorded. The county recorder would be presented with what essentially looks like a photocopy containing cursive-font signatures, hardly inspiring confidence in its authenticity and lacking any method to check the document's electronic tamper-seal—the digital equivalent of examining wet-ink signatures and notarial seals on paper documents. What was needed was a solution both to make printed-off copies of "native digital" documents legally recordable and to provide county recorders and third parties reasonable assurance that the paper copy faithfully represents the electronic original.

The MBA-ALTA Model's "papering out" provision is essentially a notarial copy certification. It contains two necessary, operative provisions. The first grants authority to a notary to make the certification as a notarial act; the second makes such a certified copy eligible for recording, notwithstanding any contrary "originality" requirements in the recording statutes. Its other provisions are helpful but not, strictly speaking, necessary. These include spelling out the notary's duties of care (*e.g.*, "personally print or supervise the printing of the electronic record onto paper" and checking the document's "tamper seal" to confirm the lack of changes or modifications to it); providing a form of notarial certificate; and excluding certain oversized plats and surveys, which are often recorded in separate locations and have special requirements of

[214] Uniform Real Property Electronic Recording Act § 2(1) (definition of "document"), § 2(3) (definition of "electronic document"), and § 3 (validity of electronic documents, signatures, and notarization).

medium and size.[215] It is important to point out that it is not *the* notary who performed the underlying remote or electronic notarization who must then perform the copy certification. Such a limitation would make little sense, for single documents could contain multiple acknowledgments performed by multiple notaries, and the notary who performs the underlying acknowledgment might work for one company in one location (such as for a notary service provider) far removed from the place where the document is printed and submitted for recording (such as at a local bank or title company). Furthermore, a "papering out" notarial act is a *traditional* notarial act, involving ink and paper and performed after the document is printed, and not one performed electronically. The important policy consideration is that *a* commissioned notary must perform the certification and provide the necessary link in the chain of custody. Thus constituted, "papering out" gives third parties greater confidence that the recorded paper copy was a faithful reproduction of the electronic original, and it creates a chain of custody through the certifying notary if questions arise. Many states enacting remote notarization laws have included "papering out" provisions in their legislation, and indeed even states with universal electronic recording capabilities have found "papering out" to be a useful backstop in the event electronic recording becomes unavailable for any reason.[216] Texas revisited its law during the 2019 session to include a new "papering out" option.[217]

[215] MBA & ALTA, Model Legislation, at pp. 18–21 (unnumbered appendix to model legislation's text).
[216] Several states report 100% coverage of electronic recording across all county recording jurisdictions, including Arizona, Colorado, Delaware, the District of Columbia, Idaho, Iowa, Maryland Massachusetts, Nevada, Oregon, and Wisconsin. *See* PRIA, eRecording Jurisdiction Coverage, https://hub-priaus.hub.arcgis.com/ (last visited Aug. 30, 2020). Several of these states have nonetheless passed remote notarization laws that included "papering out" provisions. *See* IDAHO CODE § 51-120(3); IOWA CODE § 9B.20(2A); MD. CODE ANN., STATE GOV'T § 18-220(c); ORE. REV. STAT. § 194.305(3); WISC. STAT. § 140.20(3). Arizona, Colorado, and Nevada did not.
[217] TEX. PROP. CODE § 12.0013.

3. RULONA 2018

Another notable success of the MBA-ALTA Model Legislation is that it immediately prompted the Uniform Law Commission to revisit its prior work on the 2016 Amendment to RULONA. Instead of being restricted to overseas signers, a new set of revisions to RULONA would make remote notarizations available to anyone within or outside the U.S. and drive greater convergence with the new policy vision inspired by Texas. However, unlike the MBA-ALTA Model, which was designed to sit on top of any state's existing notarial law requiring minimal changes to existing statutes, the 2018 revisions to RULONA are incorporated into a truly comprehensive, overarching notarial law—one which covers such topics as the commissioning process, notary bonds, official notarial stamps, notary journals, bond requirements, prohibited conduct, interstate recognition, forms of notarial certificates, and so on. In states that have enacted the 2010 version of RULONA, inserting the 2018 revisions is rather simple. But states with older notarial laws on their books face the choice of doing a general upgrade—a "repeal and replace" of all preexisting notarial law—or of finding a way to fit the relevant provisions of RULONA 2018 into an existing statutory framework. Maryland[218] represents a state that has taken the former approach; Hawaii[219] and Alaska[220] the latter.

RULONA 2018 makes a couple of policy choices that distinguish it from the MBA-ALTA Model (and from Texas), including several "lessons learned" after participants drafted and enacted remote notarization laws around the country. The watchwords of these differences are increased policy flexibility and clarity. The first major difference concerns the Authentication Question. The uniform law enshrines multi-factor authentication by requiring "at least two

[218] MD. CODE ANN., STATE GOV'T § 18-201 et seq.
[219] S.B. 2275 (Haw. 2020) (pending governor's signature as of this writing).
[220] H.B. 124 (Alaska 2020) (which, *inter alia*, enacted RULONA § 14A as new ALASKA STAT. § 44.50.075).

different types of identity proofing"[221] whereas, it will be recalled above, Texas had required "credential analysis" plus "identity proofing." This very deliberate policy choice was intended so as not to tie remote notarizations to use of a *token* (identification card) as the "first factor" of authentication while permitting variation only in "second factors" such as *shared secrets* (like KBA) or *biometrics*. Instead, any combination of factors that may prove technologically and commercially viable in the future could suffice. So, for example, if some sort of biometric identifier, like facial recognition or iris scans, coupled with a shared secret becomes the standard for authentication in a few years' time, then RULONA is flexible enough to permit remote notarization laws to keep pace. As before, the secretary of state or other commissioning official was expressly given the authority to set such technology standards for "identity proofing" or to modify them in the future.[222] In general, this is a salubrious policy decision.

On the other hand, the argument in favor of the Texas/MBA-ALTA approach of requiring "credential analysis" is essentially that that horse has already left the stable. Over the past four decades states have enacted laws of more or less specificity enabling notaries to ask for various forms of government ID as "satisfactory evidence" of identity for traditional, in-person notarizations. Indeed, RULONA itself expressly does so and lists the characteristics the ID must meet to be acceptable.[223] If the use of government-issued identification tokens becomes obsolete in notarial law, then every state is going to have to update its notarial statutes anyway. No law is immune to obsolescence.

Furthermore, requiring "credential analysis" could itself have salutary policy effects for the stability in notarial law generally. One way of viewing remote notarization is that it

[221] Revised Uniform Law on Notarial Acts § 14A(c)(1)(C) (2018).
[222] *Id.* at § 14A(h)(2).
[223] *Id.* at § 7(b).

constitutes the *second* great revolution in notarial law over the past half century, one in which we have redefined what it means to "appear before" a notary while keeping the essential human-to-human interaction intact. (One might be tempted to call the enabling of electronic notarization around the turn of the century a "revolution," but in fact e-notarization has been scarcely used and its full impact is only now playing out.) And what was the *first* revolution, you may ask? As explained above, it was only in the 1980s that states began to overturn centuries of settled notarial law and custom by permitting notaries to notarize documents for principals identified through government-issued IDs. No longer would notaries be required to know the principal personally or have the principal's identity vouched for by a credible witness known to the notary.

This first revolution was arguably the greater change, for it substituted a government bureaucracy (the state DMV or U.S. State Department) as the ultimate arbiter of identity in place of the deeply personal, community-based knowledge that was presumed to underlie notarial practice since the Middle Ages. And yet, this revolution occurred without great fanfare. There were, for example, no attempts to re-think the question of interstate recognition as a result of this radical innovation, no claims that accepting government IDs resulted in a fundamental transformation of the "notarial act." So even though California permits certain forms of ID that Arizona prohibits,[224] there were no sleepless nights in Phoenix worrying about Sacramento's ostensible "race to the bottom."[225] In other words, because every state passed substantially similar laws and was soon more or less "doing the same thing," a general uniformity of practice

[224] *Cf.* CAL. CIV. CODE § 1185(b)(3) and ARIZ. REV. STAT. § 41-311(11).

[225] That is to say, California's notarial law is no such thing. Your authors are certainly aware that remote notarization over the internet makes seeking the services of other states' notaries easier than in the past, which is the sole reason why the two examples of California and Arizona were chosen for this illustration. The differences in notarial practice between these two neighboring states is significant enough to encourage cross-border travel to seek notarial services, and yet the incentives created by California did not cause its neighbors to erect barriers to competition in an attempt to weed out "unsafe" notarizations.

resulted in continuity of the underlying law.[226] The same could be said about requiring "credential analysis" for remote notarizations. Continuity with past practice and general uniformity amongst the states could foster longer-term stability in the law.

A second and related policy difference is that RULONA continues to permit the use of credible witnesses to vouch for the identity of the principal in a remote notarization (what RULONA calls the "remotely located individual"),[227] whereas the MBA-ALTA model is silent on the subject.[228] In general, title companies have frowned on the use of credible witnesses as injecting another layer of uncertainty into the notarial process, and indeed lenders nearly always require copies of their borrowers' government-issued IDs. Yet, in the remote notarization space credible witnesses are often crucially necessary. Because the use of KBA relies largely on credit history, many disadvantaged U.S. residents or foreign signers will lack the necessary financial history to generate KBA questions. (This problem has become particularly acute as overseas U.S. consulates have closed during the COVID-19 Pandemic.) The downsides to the use of a credible witness are mitigated by the fact that both parties, the principal and witness, are captured on the audio-video recording to be retained by the notary. Like the principal, the credible witness may appear before the notary public via communication technology, in which case the credible witness must be identified either through the notary's personal knowledge, or through multi-

[226] It is precisely this lack of uniformity that bedevils remote notarization today. Were all states to pass materially similar laws, it is likely that most people would simply accept their interoperability with little fanfare, just as occurred with the change to government-ID based authentication in the early 1980s.

[227] Revised Uniform Law on Notarial Acts § 14A(c)(1)(B) (2018), generally mirroring the use of credible witnesses under *id.* at § 7(b)(2) for traditional, in-person notarizations.

[228] It should be pointed out that the MBA-ALTA Model states that identity "*may*" be verified through personal knowledge or multi-factor authentication, suggesting that these are not the exclusive methods allowed. MBA & ALTA, Model Legislation, § 8(2). This unfortunate word, a leftover from the Texas law, was intended as a grant of authority to the notary and the implication of non-exclusivity is infelicitous. *See* TEX. GOV'T CODE § 406.110(b). Some states closely hewing to the Texas/MBA-ALTA approach have corrected the improper implication, *see*, *e.g.*, OKLA. STAT. § 49-208(B), NEB. REV. STAT. § 64-411(2), and OHIO REV. CODE § 147.64(E), while others have not, *e.g.*, TENN. CODE ANN. § 8-16-310(a) and MINN. STAT. § 358.645(7)(b).

factor authentication. Or the credible witness can be in the notary's physical presence, in which case the traditional methods of identification suffice.[229]

Other differences between MBA-ALTA and RULONA also redound to the benefit of the latter. Like the Texas law, the MBA-ALTA Model requires disclosure in the notarial certificate, but it was unclear exactly *how* this was to be achieved. The words "online notarization" (in Texas) or "remote online notarization" (MBA-ALTA) seemed to be required, but it was not clear how or where in the notarial certificate these words were to appear. MBA-ALTA appears to punt this question to rulemaking or standards-setting,[230] while the Texas Secretary of State simply promulgated unofficial sample forms on its website.[231] RULONA addresses this question both by providing a safe-harbor phrase and by expressly permitting the commissioning official to promulgate model forms.[232] In addition, both models require the notary to retain the audio-video recording for a recommended period of ten years after the remote notarization is performed, but this requirement could implicate other aspects of state law that MBA-ALTA does not address.

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[229] All of this is less than crystal clear in RULONA's terse text, but it is more fully explained in the official comments. *See* Revised Uniform Law on Notarial Acts § 14A cmt. (2018) ("[A credible] witness may be located in the physical presence of the notary public and able to be identified by the notary public in accordance with Section 7(b)(2). Alternatively, the witness may be remotely located and appear before the notary public by means of communication technology, in which case the witness must be able to be identified by the notary public by identity proofing in accordance with the provisions of this Section.").

[230] MBA & ALTA, Model Legislation, § 2 ("The Secretary of State is authorized to adopt rules necessary to implement this (Chapter) . . .") and § 3 ("The Secretary of State shall by rule develop and maintain standards for remote online notarization . . ."). Reading into these provisions the authority to promulgate certificate forms assumes that doing is *necessary* or that the form of certificate is a *standard*. The Model does contain an *optional* provision that requires the secretary of state to promulgate forms of certificates of acknowledgment (although not certificates for other kinds of notarial acts). *Id.* at 18. However, no state has enacted this provision.

[231] The forms of certificate contain the sentence: "This notarial act was an online notarization." *See* Texas Sec. of State, Online Notary Public Educational Information, https://www.sos.state.tx.us/statdoc/online-np-educational.shtml (last visited Aug. 30, 2020).

[232] Revised Uniform Law on Notarial Acts § 14A(e) (2018) (with safe-harbor phrase "This notarial act involved the use of communication technology."). It will be observed that RULONA does not consider remote notarization a different species of "notarial act." Rather, under the uniform law *notary* is a *notary*, and a *notarial act* is a *notarial act*. In other words, what makes a remote notarization distinct is the *method of communication*, not the *kind of notarial act* performed, which continues be all of the traditional types (taking an acknowledgment, administering an oath, etc.). This is why RULONA's safe-harbor language discloses that "communication technology" was used rather than using a different label for the type of notarial act performed.

For example, it may not be clear that the recording is property of the notary for purposes of other state laws—such as those governing incapacity or decedents' estates—so the question arises of where the duty to retain the recording devolves if the notary becomes incapacitated or dies before the ten-year time frame lapses. MBA-ALTA is silent, whereas RULONA places the duty on the notary's guardian, conservator, or personal representative.[233] Both models permit the notary to store the recording in a "repository" or "custodian," but only RULONA permits the notary to appoint such a repository as an "agent" who can be bound by the duty to retain.[234] These differences may seem like minor quibbles, but they could have large real-world consequences for notaries performing remote notarizations and third parties seeking to subpoena or otherwise obtain a copy of a recording.

There are, unfortunately, some unhappy provisions in RULONA of which practitioners should be aware. The following discussion is not meant to cavil at what is, in general, a well-drafted and thoughtfully conceived law. It is simply to point out that there is no such thing as a "perfect" law, and RULONA is no exception.

The definition of "communication technology" contains a requirement that, "when necessary and consistent with other applicable law, [it] facilitate[] communication with a remotely located individual who has a vision, hearing, or speech impairment."[235] The origin of this clause was concerns raised by the mortgage lending community about the increasing wave of lawsuits[236] alleging that websites that do not facilitate communication with the impaired violate

[233] Revised Uniform Law on Notarial Acts § 14A(f) (2018).
[234] *Cf. id.* and MBA & ALTA, Model Legislation, § 6(4).
[235] Revised Uniform Law on Notarial Acts § 14A(a)(1)(B) (2018).
[236] In 2018, when the RULONA amendments were being finalized, there were 2,258 filed lawsuits claiming violations of Title III based on website accessibility, as compared to 814 such lawsuits in 2017, an increase of 177%. *See* Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, Seyfarth Shaw LLP, *available at* https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/ (last visited Aug. 30, 2020).

the accessibility provisions of Title III of the Americans with Disabilities Act ("ADA").[237] The problem with the phrase is that it is unclear whether it is simply calling out an existing body of law—essentially saying "if the ADA applies, then the ADA applies"—or whether it is creating a new substantive requirement; it does not say such facilitation is required when necessary *under* other law but only when "necessary," and that it be "consistent with" other law. Then there is the problem that, if the requirement is not met (even for the non-impaired?), then the technology would not satisfy the *very definition* of "communication technology," meaning that it cannot be used to satisfy the personal appearance requirement under RULONA § 6 via § 14A(b). Thankfully, non-compliance would not invalidate the notarial act itself,[238] but this provision does point to the general dangers of unwisely "calling out" other bodies of applicable law for no particular reason.[239] It is notable that RULONA's official comments say that this clause is merely intended to "*allow* for an accommodation"[240] rather than imposing a requirement. Hopefully courts will be guided by the official comments in construing some rather confusing statutory text.

[237] 42 U.S.C. §§ 12181 *et seq*. The U.S. Department of Justice ("DOJ") adopted implementing regulations in 1991, which were revised most recently in September 2010. *See* 28 C.F.R. §§ 36.102-36.104. Although the exclusive list of public accommodations in the regulations does not expressly include websites, the DOJ has, since the 1990s, stated as its official position that the ADA applies to websites of public accommodations, a view that was reiterated in 2018. *See* Letter from Hon. Stephen E. Boyd, Assistant Attorney Gen., to Hon. Ted Budd, Member of Congress (Sept. 25, 2018), *available at* https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf (last visited Aug. 30, 2020).

[238] Revised Uniform Law on Notarial Acts § 26 (2018).

[239] As we note *infra*, this is precisely why "the data privacy debate" has no place in remote notary issues.

[240] Revised Uniform Law on Notarial Acts § 14A cmt. (emphasis added) (further stating that "This subsection does not itself state when such an accommodation is required or how it will be implemented. That determination is based on other applicable law at either the federal or state level. Further, the commissioning officer or agency may adopt rules regarding the provision of accommodations to persons with a vision, hearing or speech impairment pursuant to subsections (h)(1) and (h)(2)."). A perceptive observer might note that the discussion of "accommodations" in this comment is redolent of Title I of the ADA rather than Title III, making the intended scope of this provision even less clear.

Also directly influenced by the MBA-ALTA Model, in RULONA 2018 the Uniform Law Commission decided to include a "papering out" provision.[241] Unfortunately, here the uniform law's pithy drafting style made the language a bit unclear, even confusing, with reliance to the official comments often necessary to make sense of it. The provision is short enough to quote in full:

> A [recorder] may accept for recording a tangible copy of an electronic record containing a notarial certificate as satisfying any requirement that a record accepted for recording be an original, if the notarial officer executing the notarial certificate certifies that the tangible copy is an accurate copy of the electronic record.[242]

The reference to a "notarial certificate" and a notarial officer who "certifies" has been construed by some to mean that the notary who takes the acknowledgment (or performs the verification, etc.) on the underlying document must be the same notary who completes the "papering-out" certification. But this is a misreading. Rather, the notarial certificate on the copy *is* the certification by the notary. In other words, this provision is intended to work just like the MBA-ALTA Model in permitting any traditional notary to print and certify the copy—not only the notary (or notaries) who performed the underlying notarial act. Again, RULONA's official comments make clear what in the text is slightly ambiguous.

The use of the word "may" is also unfortunate. The choice of this verb was a deliberate modeling on URPERA[243] and other provisions in RULONA itself that grant discretionary authority.[244] As used here, however, the result is perverse. It suggests that county recorders have the discretion to reject "papered out" documents for recording, even if they comply with all

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[241] It actually divides the two operative provisions of "papering out" into two sections: Revised Uniform Law on Notarial Acts § 4(c) (2018) (authority of notary to make certified copies) and *id.* at § 20(c) (eligibility for recording). This latter provision more properly belongs in an amendment to URPERA, but there is no indication that the Uniform Law Commission is contemplating a revision to that earlier uniform law.
[242] *Id.* at § 20(c).
[243] Uniform Real Property Electronic Recording Act § 4(b)(2).
[244] Such as in rulemaking by the commissioning official, or the notary's discretion in selecting tamper-evident technologies. *See* Revised Uniform Law on Notarial Acts §§ 14A(h), 20(a) and 27(a) (2018).

necessary prerequisites for recording. A basic principle of recording law is that a county recorder's duties are ministerial in nature; if a document is entitled to be recorded and all formal requirements are satisfied, it must be admitted to record.[245] This vital concept in recording law is thus undermined by an ill-conceived analogy.[246] It is not surprising that some states have changed the "may" into a "shall" in their enactments.[247]

Another unclear provision is RULONA § 14A(j), which is bracketed as optional text in the uniform law.[248] This provision was never deliberated by the RULONA drafting committee but was rather the result of last-minute urging by members from Colorado on the floor of the Uniform Law Commission's 2018 annual conference, where the remote notarization revisions to RULONA were formally adopted. It is intended to address a concern that repositories who store audio-video recordings or companies that provide remote notarization technologies might be beyond the reach of the jurisdiction of the courts of the enacting state, and more particularly that plaintiffs might find it difficult to track down such a defendant. It is almost certain that a RON platform that knowingly provides services to a notary within a state is purposely availing[249] itself of the benefits of the laws of that state, but of course the scope of each state's long-arm personal jurisdiction statute must also be considered. Yet, the purported solution of subsection (j) might

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[245] The "ministerial" vs. "discretionary" nature of a recorder's duties of course has implications for whether, *e.g.*, tort liability might attach under a state's tort claims act with a qualified immunity defense, or the recorder may be subject to a writ of mandamus. *See* 63C AM. JUR. 2d PUBLIC OFFICERS AND EMPLOYEES § 313; 55 CORP. JUR. SEC., MANDAMUS § 72.

[246] Indeed, URPERA is a false exemplar, for the use "may" in that law simply means county recorders have discretion to set up e-recording systems, not that they have discretion to reject documents entitled to be recorded once such a system is established. The analogy was inapt.

[247] IDAHO CODE § 51-120(3), and N.D. CENT. CODE § 44-06.1-18(3). States retaining the "may" include ORE. REV. STAT. § 194.305(3), REV. CODE. WASH. § 65.08.070(2), and WISC. STAT. § 140.20(3).

[248] Revised Uniform Law on Notarial Acts § 14A(j) (2018):

> [By allowing its communication technology or identity proofing to facilitate a notarial act for a remotely located individual or by providing storage of the audio-visual recording created under subsection (c)(3), the provider of the communication technology, identity proofing, or storage appoints the [commissioning officer or agency] as the provider's agent for service of process in any civil action in this state related to the notarial act.]

[249] *Hanson v. Denkla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319).

not solve this problem. The provision deems the state commissioning official as a provider's in-state agent for service of process, which thus in theory provides a mechanism for so-called "tag" personal jurisdiction.[250] One problem with this purported solution is that it may not be effective against corporate defendants in light of recent U.S. Supreme Court decisions.[251] Another is that it does not relieve a plaintiff from the requirement of providing reasonably calculated notice to a defendant.[252] It is therefore unclear whether the commissioning official is being tasked with finding a defendant and forwarding any notice received or whether the official is not actually required to do anything beyond serve as a passive recipient. In either case, it creates an administrative burden without any certain benefit.

Furthermore, it is important to point out that the definition of "communication technology," to which subsection (j) applies, is *not* the equivalent of "RON platform." The definition encompasses any and all technologies that permit a principal to communicate remotely with a notary. Today, that likely includes whoever has provided the computer or smart device, the webcam manufacturer, the internet service provider (ISP), any cloud storage company, any software provider, and so on. The purpose of such a broad definition is to encompass any future technologies that might replace the internet-and-webcam based technologies we rely on today.[253] As a result, even if subsection (j) applies to a RON platform that directly contracts to provide

[250] So-called "tag" personal jurisdiction was reaffirmed by *Burnham v. Superior Court*, 495 U.S. 604 (1990). The provision in subsection (j) is similar to the pre-*Int'l Shoe* statute upheld in *Hess v. Pawloski*, 271 U.S. 352 (1927), which designated the Massachusetts register of motor vehicles as any out-of-state driver's agent for purposes of service of process. Needless to say, the constitutional jurisprudence of personal jurisdiction has traveled a long way over the past 90 years.

[251] *Daimer AG v. Bauman*, 571 U.S. 117, 122 (2014) (corporate contacts with state must make it "essentially at home" there). *See*, *e.g.*, *Martinez v. Aero Caribbean*, 764 F.3d. 1062 (2014) (holding corporate officer's physical presence in a state is not sufficient for "tag" personal jurisdiction).

[252] *Jones v. Flowers*, 547 U.S. 220 (2006).

[253] This distinction was completely lost, for example, in COLO. REV. STAT. § 24-21-502(11.7), where the definition of "remote notarization system" copies verbatim RULONA's definition of "communication technology," incorrectly assuming that this term was a synonym for "RON platform."

services to an in-state notary, it almost certainly fails to reach other providers of "communication technology" such as the underlying ISP or cloud storage provider whose property is unknowingly being used to facilitate remote notarizations. The same likely applies to providers of "identity proofing," who are almost always different companies from the RON platforms themselves. As a result of the unanswerable questions and administrative problems created by subsection (j) which outweigh its dubious benefit, most states that have enacted RULONA § 14A have declined to include it.[254]

Finally, an explanation of RULONA's so-called "overseas signer rule," a version of which makes an appearance in the MBA-ALTA Model, is useful.[255] This rule requires some sort of "nexus" to the United States whenever a principal is in a foreign country —whether the tie is transactional, via property located here, or a document to be used in some domestic public office. This part of the rule is basically unproblematic. However, the rule also, and far more controversially, requires that the act of signing the document or giving the oath or affirmation not be prohibited by the foreign country in which the principal is located. The "overseas signer rule" was accepted by the Uniform Law Commission at the urging of the U.S. State Department for diplomatic purposes, essentially to ensure that remote notarizations would not infringe on other countries' sovereignty or be used to circumvent their notarial law regimes. It also poses interpretive difficulties.

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[254] Subsection (j) has been enacted in ALASKA STAT. § 44.50.075(h), IOWA CODE ANN. § 9B.14A(10), KY. REV. STAT. § 423.455(9), and N.D. CENT. CODE. § 44-06.1-13.1(10). It was not included in the enactment of RULONA 2018 in Hawaii, Idaho, Maryland, Montana, Minnesota, Oregon, Washington, or Wisconsin, and has not been introduced elsewhere to date. One final irony of subsection (j) is that when Colorado enacted is remote notarization law in 2020, it did not include this provision that the Colorado delegation was so keen to press. Instead, its new law requires the secretary of state to pre-approve any RON platform directly providing services to Colorado and for these RON platforms to keep a place of business or a registered agent in the state—a far more conventional and satisfactory solution to this problem, if indeed a problem it even is. COLO. REV. STAT. § 24-21-514.5(11)(b).

[255] Revised Uniform Law on Notarial Acts § 14A(c)(4) (2018); MBA & ALTA, Model Legislation, § 5.

There are logically two ways to read the rule. The first way is as a *condition on the notary's authority* to perform remote notarizations. This is the most literal reading of the text, which says "a notary public . . . *may* perform a [remote] notarial act . . . *if*" the rule is followed.[256] An alternative and far more rational reading makes it merely a *requirement* or *notarial duty* for which negligence liability may attach without impinging on the underlying validity of the notarial act.[257] But the official comments expressly disclaim that the rule "impose[s] a requirement upon a notary public to . . . understand . . . the laws of a foreign country"; instead, it is merely intended to "alert internal users of remote notarial services" of potential liability or sanctions.[258] It is hard to square the idea that no requirement to understand the rule's application is imposed on a notary, and that it merely serves as an "alert" to the unwary, but that failure to follow the rule results in a potentially invalid notarization.

In fact, no one has provided a coherent explanation of how this is supposed to work. Having spotted the logical inconsistencies, the MBA-ALTA Model and several states changed the rule to require the notary to have "no actual knowledge" of a contrary foreign law.[259] Thus

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[256] Revised Uniform Law on Notarial Acts § 14A (2018) (emphasis added). RULONA's official comments provide some backing for this reading. *Id.* at § 14A cmt. ("Thus, this subsection states that, in order for the notarial act to be permitted under this Section, the act of making the statement or signing the record must not be prohibited in the foreign country in which the remotely located individual is situated."). The context of this statement, however, is the avoidance of penalties by the notary and principal.

[257] Again, this is a consequence of the rule of validity found *id.* at § 26. The "overseas signer rule" is merely one of *four* requirements a notary must follow when performing remote notarizations, the others being (i) authenticate the signer, (ii) "reasonably" confirm the document, and (ii) create and audio-visual recording. All of these actions are clearly "requirements" or "duties," of which the failure of the notary to perform does not result in invalidation of the notarial act under *id.* at § 26; they cannot conceivably be construed as conditions precedent for the notary's authority to perform remote notarizations. Compare, for example, the authentication requirements of *id.* at § 7 and the journal-keeping requirements of *id.* at § 19—both exact parallels to these remote notarization provisions and both obviously notarial duties for purposes of *id.* at § 26.

[258] *Id.* at § 14A cmt. That overseas signers will read state statutory law prior to a remote notarization and be thereby "alerted" to the potential danger is dubious. RULONA's official comments also state that notary and principal "should" consult any list prepared by the U.S. State Department of those countries prohibiting remote notarizations within their borders—again, an exhortation, but not a duty.

[259] MBA & ALTA, Model Legislation, § 5(3)(a). *See*, *e.g.*, ARIZ. REV. STAT. § 41-373(3)(b), COLO. REV. STAT. § 24-21-515.5(2), MINN. STAT. § 358.645(3)(3)(i), OHIO REV. CODE § 147.64(C)(2), & OKLA. STAT. § 49-205(3)(b). Several early-adopting states, like Tennessee, Texas and Virginia, lack an "overseas signer rule" altogether.

modified, the rule at least has the merit of requiring the determination of an ascertainable fact at the time of the notarization without requiring the notary to know the laws of 194 foreign countries. This solution would also avoid the Scylla of imposing an impossible burden on a notary and the Charybdis of making notarial acts potentially void; and yet, remarkably, the Uniform Law Commission opposed the "actual knowledge" qualifier in the MBA-ALTA Model because it *implies a notarial duty* that RULONA purportedly disclaims. A small grace is that it appears the rule—or rather its problematic second half—is currently inoperative because *no* foreign country has prohibited remote notarizations to date.[260]

4. RULONA and "Paper RON"

One final significant difference between Texas/MBA-ALTA and RULONA 2018 merits separate discussion because of its lively and contemporary relevance since the beginning of the COVID-19 Pandemic. Although it is not explicitly stated, the MBA-ALTA Model (building as it did on the Texas and Virginia laws) makes remote notarizations a subset of e-notarization generally. That is, remote notarizations are intended to be used on "native digital" documents that the principal has electronically signed and that the notary electronically notarizes.[261] By contrast, RULONA permits the use of remote notarization with tangible (*i.e.*, paper) documents. How this is so requires some explanation.

As originally envisioned by the Virginia law way back in 2011, remote notarization was conceived as a species of electronic notarization, so that only a Virginia "electronic notary

[260] Of course, this is only to the best of your authors' knowledge. The State Department has not published a list of countries prohibiting remote notarizations, as it had agreed with the Uniform Law Commission to do.
[261] *See*, *e.g.*, MBA & ALTA, Model Legislation, § 1(11) (principal defined as person who uses an "electronic signature"), § 1(12) (a "remote online notarial certificate" defined to contain the notary public's "electronic signature" and "electronic seal"), § 7 (on use of notary's electronic signature and seal), § 8(2) (remote online notarization assumed to be performed for "person creating an electronic signature").

public" had authority to perform remote notarial acts. The idea was that not only would the principal and notary communicate in real time by electronic means, but they would also exchange, manipulate, and sign the documents both electronically and *simultaneously*, just as is done for traditional in-person notarizations. The result of the notarial process would be tamper-sealed electronic documents. This all makes great sense not just from a security standpoint but also from the point of view of traditional notarial law, in which the notary is required to complete the notarial certificate contemporaneously with the performance of the notarization.[262]

However, there is at least one important type of notarial act that does not require the principal to sign the document in the notary's presence—the acknowledgment. For centuries, it was extremely common for a grantor to sign a deed and to acknowledge it before a public officer at some later time (maybe months or years later), because distances were vast, notarial officers scarce, and the acknowledgment was only necessary as a condition for recording; in fact, it was quite common for the acknowledgment to be made before the recording officer only at the time of recording. Only with the rise of the modern real estate settlement did it become standard practice for the *signing* to take place at the same time as the *acknowledgment*. But an acknowledgment to this day is not the act of signing a document before a notary; rather, it is the act of *declaring* before a notary that the principal *has signed* the document at some time in the past (whether seconds or years ago).[263] As explained in RULONA's official comments, "actually

[262] This rule is codified in Revised Uniform Law on Notarial Acts § 15(a)(1) (2018).

[263] *See*, for example, the definition of "acknowledgment" in RULONA: "a declaration by an individual before a notarial officer that the individual has signed a record for the purpose stated in the record . . ." *Id.* at § 2(1). The verb "declaration" implies an oral statement. However, there are other actions sufficient under the case law to make a proper acknowledgment. *See generally* 1A CORP. JUR. SEC., ACKNOWLEDGMENTS § 42. In some old cases, neither a "casual admission" nor "the mere casual presence of a putative grantor and the possession of an instrument purporting to have been signed" was a sufficient acknowledgment. 1 CORP. JUR., ACKNOWLEDGMENTS § 136; *Chester v. Breitling*, 88 Tex. 586, 589, 32 S.W. 527, 528 (1895) ("It is clear that a casual admission, in the presence of a notary or other duly-authorized officer, by a person who has signed a conveyance, that he had executed the deed, does not empower the officer to certify that he has acknowledged it."). Under the law of some states, signing a

signing the record in the presence of the notarial officer is not necessary as long as the individual declares, while in the presence of the officer at that time the acknowledgment is made, that the signature already on the record is, in fact, the signature of the individual."[264]

This feature of acknowledgment law permits a remote notarization to take place with wet-ink-signed, paper documents. A principal can sign a document, mail it to a notary, and then join a remote notarization webcam session in which the notary takes the principal's acknowledgment and completes the notarial certificate with a wet-ink signature and seal. The requirement that the notary complete the certificate contemporaneously with the performance of the notarization (at the time the acknowledgment is taken via webcam) is also thereby met.

At the RULONA drafting sessions, the Montana secretary of state's office was quite explicit that Montana's then-current remote notarization law was designed precisely to accommodate this practice. It was unanimously agreed that limiting remote notarizations to "native digital" documents was not strictly necessary. In its final form, RULONA thus permits the remote notarization of any "record," whether tangible or electronic.[265] The only caveat is that, whatever form it takes, the document must be "reasonably" confirmed by the notary to be the same one that was previously signed.[266]

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document before a notary is sufficient for an acknowledgment, but not necessary. *E.g.*, VA. CODE § 47.1-2 ("acknowledgment" defined as where principal "*indicates* to the notary" having signed a document); *Cumbee v. Myers*, 232 Va. 371, 374, 350 S.E.2d 633, 634 (1986) ("A certificate of acknowledgment signifies that the person acknowledging the document stated in the presence of the notary that the document was his or her act. The person may either have already signed the document or the person may sign the document in the notary's presence."); *American Economy Ins. Co. v. Paul*, 872 S.W.2d 496, 498 (Mo. Ct. App. 1994) ("An assignment is 'acknowledged' if the seller signs the title before a notary public.").

[264] Revised Uniform Law on Notarial Acts § 2 cmt. (2018).

[265] *Id.* at § 2(10) ("'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.").

[266] *Id.* at § 14A(c)(2). As explained in the official comments, various procedures might be "reasonable":

> Thus, for example, a remotely located individual might electronically transmit a record to a notary public; alternatively, the remotely located individual might simply submit the original paper record to the notary public by mail. In either case the notary public might visually display the record to the individual (perhaps reading some or all of the record to the individual) and ask the individual whether the statement or

In this way, RULONA permits what some have begun to call "paper RON" or, to add to the alphabet soup, "PRON."[267] This terminology is intended to distinguish a paper-based remote notarizations performed under RULONA or similar laws from the new "RIN" concept ("remote ink-signed notarizations") that arose under the various governors' COVID-19 emergency orders, discussed below.

The concept of PRON might add flexibility to remote notarizations, but it also leaves open several critical problems outside the realm of acknowledgments. It is clear that the notarial act of "witnessing a signature," which is sometimes resorted to for attesting a will,[268] cannot be accomplished using the process described above: the notary never actually sees the principal sign the document. But what about completing a jurat on an affidavit, more properly "taking a verification upon oath or affirmation"? Most state statutes and case law are not entirely clear. RULONA's definition of this notarial act does not directly address the question and in fact suggests that PRON is possible,[269] but the short-form certificate requires the notary to certify that the statement was "*signed* and sworn to (or affirmed) *before me* . . ." (emphasis added).[270] This language suggests the notary must actually witness the principal sign the affidavit. But because

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> signature is that of the individual. Alternatively, a notary public might verify the record by means of a secure electronic signature tied to the tamper-evident electronic record which the notary public is notarizing.

Id. at § 14A cmt.

[267] American Land Title Association, *Notarization Types and Terminology*, *supra* n.2.

[268] *In re Freidman*, 116 Nev. 682, 6 P.3d 473 (2000); *In re Estate of Alfaro*, 301 Ill.App.3d 500, 703 N.E.2d 620 (App. Ct. Ill. 1998); *In re Estate of Gerhardt*, 336 N.J.Super. 157, 763 A.2d 1289 (Sup. Ct. N.J. 2000); *In re Estate of Price*, 73 Wash.App. 745, 871 P.2d 1079 (Ct. App. Wash. 1994).

[269] Revised Uniform Law on Notarial Acts § 2 cmt. (2018) ("A 'verification upon oath or affirmation' is a common form of notarial act. It is a declaration by an individual before a notarial officer in which the individual states on oath or affirmation that the declaration is true. This declaration is sometimes referred to as an 'affidavit' or 'jurat.'"). There is no mention in this definition of the notary's witnessing the principal's signature on the document in which the "declaration" is made.

[270] *Id.* at § 16(3).

this is merely a sufficient,[271] and not a necessary, form of certificate its language is not controlling as to the required actions constituting the notarial act.

If, as discussed below in relation to the various state "RIN" emergency orders, the notarial process were reconfigured for the notary first to witness the signature via webcam, and then sometime later to complete the notarial certificate after having received the document in the mail, then under RULONA the notary would need to devise some "reasonable" way to determine that the document is in fact the same one previously signed. But even assuming such a "reasonable" method, the notary would still be breaching a duty under RULONA § 15(a)(1) by failing to complete the certificate contemporaneously with the notarization. There are no simple answers to these questions, short of a state legislature un-doing any signature-witnessing requirement for verifications, un-doing the contemporaneous notarial certificate requirement, or both.[272]

In short, the process of "paper RON" envisioned and permitted by RULONA works reasonably well in the world of acknowledgments. When extended to other kinds of notarial acts, the wheels start to go wobbly. Since many real estate transactions involve not just the notarization of deeds and mortgages (requiring acknowledgments) but also affidavits (requiring verifications), it is not clear how useful to the real estate industry paper-based remote notarizations under RULONA will be in practice.

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[271] *Id.* at § 16 ("The following short form certificate of notarial act are *sufficient* for the purposes indicated, if completed with the information required by Section 15(a) and (b) . . . ." (emphasis added)).

[272] Massachusetts proposed one possible—though admittedly cumbersome—solution: require two separate audio-video conference sessions. In the first, the notary witnesses the principal sign the document; in the second, the notary confirms that document received is the same one previously signed and then completes the certificate. *See* SD.2882 (Mass. 2020) and H.4658 (Mass. 2020).

5. A few other issues

In addition to the issues discussed in considerable substance above, we briefly note for the historical record a few other matters that arose as remote notary legislation advanced nationwide. In some states, substantive real estate law requires that signatures on deeds and similar instruments be witnessed. Note that this is different from the question of whether a principal can be authenticated by a "credible witness" for notarial purposes. Among the main questions has been where, physically, the witness is to be in relation to the notary or principal, and how the witness should be authenticated. The Florida statute is a good example of how these issues have been resolved: it permits the notary to be either physically with the principal or remote from the principal, but requires that the witness be authenticated in the same manner as the principal, if the witness is in a different location than the principal.[273] As a general matter, witnesses are more often an issue in trust & estate practice than in real estate practice, and the "remote witnessing" issue has therefore often become bound up with trust & estate issues where it has arisen. The fundamental issues (authenticating the witness, making sure that the witness is disinterested and not incapacitated, and then being able to attribute the signature to the witness should the witness be called upon to testify in the future) are little different in trust & estate matters than in real estate matters. But the reason the issue has proven more challenging in trust & estate matters is that there is no equivalent of title insurance to assume these risks.

Another issue that has arisen from time to time is the interaction of notarization and the practice of law. By and large, these issues were worked out many years ago, and many notarial statutes expressly prohibit a notary from providing legal advice or services unless the notary is

[273] FLA. STAT. § 117.285.

also a member of the appropriate bar.[274] There is nothing new here other than the internet's potential to allow a person to project services across the globe. While occasioning some sound and fury in places where it has arisen, the issue is settled law: notaries are not lawyers unless they are also lawyers.

Finally, there is the matter of privacy. This is a difficult and developing public policy question in the United States, where at present we lack a true, national, comprehensive data privacy regime in the manner of the European Union's General Data Protection Regulation.[275] Privacy law in the United States is a rapidly changing area, as some states look to the California Consumer Privacy Act[276] and contemplate their own similar legislation. Whatever public policy choices may be made about this subject in the future, one thing is certain: *privacy issues are bigger than notary issues*. State-level notarial statutes are not the place to attempt a resolution to this thorny nationwide public policy issue. As we discuss above regarding the ADA, "calling out" tangential areas of law in notary statutes is a recipe for trouble, made doubly dangerous by the fact that privacy law is an area in significant flux.

6. But nothing happened?

As we discuss above, the pace of remote notary legislation accelerated from 2012 up through the beginning of 2020, and the legal moving parts of remote notarization became apparent to those who delved into the issues. There are only a few stable configurations of these moving parts, and these configurations became the model acts, which in turn informed most of the approximately two dozen states that had passed remote notary laws by the beginning of

[274] *See, e.g.*, Revised Uniform Law on Notarial Acts § 25(a)(1) (2018) (forbidding a notary to "assist persons in drafting legal records, give legal advice, or otherwise practice law").
[275] *See, e.g.*, Complete guide to GDPR compliance, https://gdpr.eu/ (last visited Aug. 30, 2020).
[276] CAL. CIV. CODE § 1798.91 *et seq*.

2020.[277] And yet, as the calendar turned to 2020, remote notarization still remained largely a novelty when it came to actual use in real estate transactions. Given the countless hours of debate and effort that had gone into these statutes, how could this have been the case?

IV. THE GHOST OF CLAYTON CHRISTENSEN

> *"I have my own theory about why decline happens at companies like IBM or Microsoft. The company does a great job, innovates and becomes a monopoly or close to it in some field, and then the quality of the product becomes less important. The company starts valuing the great salesmen, because they're the ones who can move the needle on revenues, not the product engineers and designers. So the salespeople end up running the company."*
>
> --*Steve Jobs* [278]

The words of the inimitable Steve Jobs quoted above are a pithy explanation, but in truth, this theory did not belong to Jobs. It belonged to Clayton Christensen, the leading scholar of "disruptive innovations" and how large enterprises are unable to digest them. Christensen's basic thesis is that large organizations ignore emerging developments because they do not produce immediately-recognizable revenue from established, well-heeled, existing customers.[279] Notwithstanding the fact that remote notarization came onto the scene in 2012 at the latest, that model laws were agreed-to, and that nearly half of the states had passed remote notarization laws prior to the COVID-19 Pandemic, how is it that not one part of the real estate ecosystem was sufficiently prepared to deal with remote notarizations when the Pandemic suddenly caused a shift from paper documents, notarized by traditional means, to electronic documents, notarized by RON means?

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[277] Notable outliers included not only Virginia (obviously), but also South Dakota and Vermont. Suffice it to say that these states' approaches have been overtaken by the superior approaches of the model laws.
[278] WALTER ISAACSON, STEVE JOBS 568–69 (2011).
[279] CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL xxiii–xxiv (2016 rev. ed.) ("The highest-performing companies . . . have well-developed systems for killing ideas . . . [about] lower-margin opportunities that their customers don't want—until they want them. And by then it is too late.").

The answer, as Christensen's work shows, is that large organizations who have established themselves chase after immediately-recognizable, high-value revenue opportunities and ignore emerging developments that do not offer immediate, material revenue prospects.[280] Remote notarization did not provide such an opportunity for these large organizations—until suddenly it did. These organizations were unprepared and thus forced to scramble madly to try and string together a means of accommodating this overnight change in the manner by which they ingested the "can't close without it" service of notarization. The effects of this mad scramble are likely to amplify the opportunities for litigation to arise out of the unanswered legal questions that the emergence of RON had created.

A. Christensen's Theory

Christensen studied the history of "disruptive" innovations. To Christensen, a "disruptive" innovation is one spawned by a new technology that has long-term potential to create wholesale changes in a business process, but which offers no immediate, material revenue opportunity upon its invention.[281] There are a variety of reasons that a potentially disruptive innovation has no immediate revenue opportunity. For example, the technology may be immature and unreliable at the moment. Or the technology may be culturally ahead of its time.[282]

In *The Innovator's Dilemma*, Christensen traces the history of various disruptive technologies through time, from computer hardware to steam-shovels. In each case, he found a

[280] *Id.* at 77 ("Rational managers, as we shall see, can rarely build a cogent case for entering small, poorly defined low-end markets that offer only lower profitability.").
[281] *Id.* at xix ("Occasionally, however, *disruptive technologies* emerge: innovations that result in *worse* performance, at least in the near term . . . . Generally, disruptive technologies underperform established products in mainstream markets." (emphasis in original)).
[282] *Id.* ("[Disruptive technologies] have other features that a few fringe (and generally new) customers value. Products based on disruptive technologies are typically cheaper, simpler, smaller, and, frequently, more convenient to use.").

similar pattern: the technology simmers beneath the surface of a market, of interest to only a few "early adopters" at first.[283] These early adopters tend to be smaller players in their respective marketplaces, more willing to take chances on new or different products or processes. Vitally, because they tend to be smaller players in their marketplaces, they tend to have smaller and less-valuable customers, who are equally willing to take chances on new or different products or processes in hopes of finding a winner that can displace larger competitors.[284]

Meanwhile, the larger players in the market segment are laser-focused on increasing the revenue they can gain from the largest and most lucrative customers. Large enterprises are driven by economies of scale and employee incentives to seek more and more market share and wallet share from the biggest and most valuable customers in their sector. These large players have built corporate social structures around catering to the needs of these large, valuable customers—who are likely large players in their own respective spaces with similar corporate social structures.[285] These types of organizations and their customers are by their very nature less likely to be interested in "emerging" or "developing" products or services, because they are essentially distractions from the goal of maximizing immediate sales of existing products and services.[286]

As a result, the disruptive innovation finds its first home with small players. The technology is often unreliable and suboptimal at first, but slowly it improves. As its performance and reliability begin to improve, it slowly begins to attract more mainstream customers. The large organizations, blinded by their laser focus on the largest-tier customers, ignore the technology because "our customers don't want it," and continue to focus on established means of

[283] *Id.*
[284] *See id.* at 210 ("Historically, as we have seen, the very attributes that make disruptive technologies uncompetitive in mainstream markets actually count as *positive* attributes in their emerging value network." (emphasis in original)).
[285] *Id.* at 81 ("[A]s companies . . . search [for] greater profitability in the market tiers above them, they gradually come to acquire the cost structures required to compete in those upper market tiers.").
[286] *Id.* at 80 ("Moving upmarket towards higher-performance products that promised higher gross margins was usually a more straightforward path to profit improvement. Moving downmarket was anathema to that objective.").

servicing those largest customers and fighting with one another for the highest-tier reaches of the established marketplace. And still the disruptive technology grows faster, better, and cheaper, right under the nose of the large organizations.[287]

Suddenly, a switch flips: the largest customers in the marketplace begin to demand that they too be serviced using the disruptive innovation.[288] The large organizations now scramble to find ways to adopt the disruptive technology, but the very corporate social structures that they built make it difficult (if not impossible) to accept the innovation. Sales incentives are not aligned to it. Existing workflow processes must be massively retooled. Huge swaths of employees must be retrained. This takes time, energy, and resources, and the large organizations struggle to adapt. Eventually, frustrated with the large organizations' inability to provide the disruptive innovation, now even the large customers join their small and mid-tier cohorts in seeking out the providers who already have the innovation and have aligned their corporate social structures around it.[289] This "first mover advantage" is why Christensen subtitled his book *When New Technologies Cause Great Firms to Fail*.

Indeed, Christensen's research shows that the process has recurred so often in business history that it is nearly formulaic:

> Step 1: A disruptive technology is first developed, often within an established firm;
> Step 2: Marketing personnel of the established firm seek feedback on the new technology from their 'best' customers, who report that the new technology is of little interest to them;
> Step 3: The established firms thus ignore the disruptive technology and instead step up the pace of investment in 'sustaining' (existing) technologies;

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[287] *See, e.g.*, *id.* at 92–93 (explaining how the steel industry ignored a disruptive technology, ultimately to its chagrin).
[288] *Id.* at 41 (noting that a disruptive technology that reaches maturity can "knock[] out the established technology and its established practitioners, with stunning speed").
[289] *E.g., id.* at 47 ("The firms attacking from value networks below brought with them cost structures set to achieve profitability at lower gross margins.").

Step 4: New companies are formed around the disruptive technology, and markets for the disruptive technology are found by trial and error;
Step 5: The entrants in the disruptive technology marketplace bring the disruption to maturity, and move upmarket;
Step 6: Established firms belatedly jump on the bandwagon to defend their customer bases, but find themselves woefully outmatched and underinvested.[290]

Perhaps no example better tells the tale of disruptive innovations than Kodak. Kodak was the dominant player in physical film for taking photographs. An engineer in Kodak's own labs invented digital photography in 1975 and brought the idea up to Kodak's senior executives. Kodak ultimately decided to shelve the entire concept, because the company's "best" customers had no interest in digital photography, and investing in the idea would cannibalize sales from the existing physical film product line. As we all know, Kodak went bankrupt after its core physical film product was rendered obsolete by the emergence of digital photography—a disruptive innovation that Kodak itself brought into the world.[291]

The revenue-maximizing corporate social structures of large businesses like Kodak serve as a sort of "corporate immune system" that seeks out and destroys any business idea that is inconsistent with existing streams of profitable revenue. In most times, this keeps the business healthy by organizing internal incentives around the desires of the business's customers. But disruptive innovations cause what amounts to a corporate autoimmune reaction whereby the organization attacks today the very business idea needed to keep it healthy tomorrow. Such is the innovator's dilemma: it is actually *good management* that causes great firms to fail.[292]

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[290] *Id.* at 43–48. This is nearly, but not exactly, a direct quotation of the section headings of the cited pages. To spare the reader's eye, we did not inundate you with ellipses and brackets.
[291] *See, e.g.,* Tom Braithwaite, *The White House Draws a Strange Lesson from Kodak: Cling to the Past*, THE FINANCIAL TIMES, July 30, 2020 (noting that Kodak management's response to the engineer's invention was: "If it comes at the expense of one film camera, why would we?").
[292] CHRISTENSEN, *supra* n.279, at 93 ("Sound managerial decisions are the very root of [established businesses'] fall from industry leadership.").

B. Remote Notarization and the Innovator's Dilemma

The history of remote notarization shows striking parallels to the story of other disruptive innovations as studied by Christensen. The innovation emerged in 2012, and at first was of interest to only a few early adopters. The largest consumers of notary services in the real estate sector—big banks and big title insurers—viewed it as a distraction that did not fit with their paper-based business processes. Borrowers (the customers of banks) were not asking for it, and so consequently, banks (the customers of title insurers) similarly did not ask for it. Those inside of these organizations who advocated for adoption of remote notarization processes were understandably ignored.[293]

The first purveyors of remote notarization technology were a set of scrappy startups who formed in an effort to take advantage of the new Virginia law. As discussed above, these startups appear to have had visions of deploying a "disrupt and consolidate" business model that would nationalize the business of notarizations into a dominant platform, just as Uber disrupted and nationalized the taxi business. They therefore began with a "direct to consumer" strategy as many startups do. This proved more difficult than they may have anticipated due to a number of factors, many of them legal issues discussed above. Among the business hurdles to this strategy also included the wide variety of reasons that people seek a notary's services (sometimes involving real estate, and sometimes not), and the need for notarial services being relatively infrequent. It turns out that people look for a notary far less often than they look for a taxi. Marketing straight to the general public was not working.

The startups then sought out more consistent sources of revenue by finding businesses that need notarizations performed at scale. The industry that most heavily and consistently

[293] *Id.* at 84 ("Even when a senior manager decides to pursue a disruptive technology, the people in the organization are likely to ignore it . . . .").

utilizes notaries is, as described above, the real estate industry. People buy, sell, and finance houses infrequently; as of this writing the average tenure of homeownership is about 8 years.[294] But there are companies whose very business is facilitating these transactions: title insurance companies. And so the startups sought to gain the business of title insurers and their title agents.

While title insurers' business personnel were interested in the efficiency gains that a remote notarization process might have provided, the entire real estate transaction process has (as set forth above) been paper-based for centuries. Remote notarization in its initial form required the use of electronic documents. Title insurers' business personnel checked with their biggest customers—the large banks—and found that the large banks had also built their enormous business architectures around the use of paper documents. The title insurers' biggest customers didn't want to change their processes, so why should the title insurers want to do so?

Further, title insurers' business model is based on achieving certainty (or near-certainty) by actively working to eliminate risk before taking on an insurance obligation.[295] (This is in direct contrast to "typical" casualty-based insurance lines, who attempt to estimate the probability of a claim and who are permitted to adjust their premiums in light of that probability, but whose business is not based on "curing" identified defects.[296]) Yet, as discussed previously, remote notarization and the electronic documents it produces created *un*certainty. Being regulatorily unable to adjust their premium structures to account for the increased risks these issues represented, title insurers were understandably loathe to take them on.

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[294] *Average Homeowners Stay 8 Years Before Moving*, REALTOR MAGAZINE, May 3, 2020, https://magazine.realtor/daily-news/2019/05/03/average-homeowners-stay-8-years-before-moving (last visited Aug. 30, 2020).

[295] *E.g.*, About the American Land Title Association, https://www.alta.org/about/ (last visited Aug. 30, 2020) ("[T]he industry seeks to eliminate risk before insuring, which provides the best possible chance of avoiding land title problems.").

[296] BARLOW BURKE, L. TITLE INS. § 2.01 (3d ed. 2019); JOYCE PALOMAR, 1 TITLE INS. L. § 1:13 (2020).

The startups next attempted to go a link up the chain and to convince the large banks to become customers. After all, if the title insurers weren't going to utilize remote notary services unless their bank customers wanted them to, the logical thing to do was to convince the banks that remote notarization was the way to go. Here too, however, the startups found the way blocked by established means of doing business and the enormous overhead investments required for process change. In particular, banks deal in the business of mortgage promissory notes. Centuries of legal rules had influenced the business processes built up around paper promissory notes. Although electronic promissory notes became available nationwide in the year 2000,[297] use of this electronic promissory note process was minimal. Making the process work correctly and legally required operational change up and down the bank's internal structure. Although making the investment could have produced long-term efficiency gains, the banks (like every other large organization) followed the well-established, good-corporate-governance model of seeking immediate revenue. The return on investment for a wholesale change to electronic documents didn't pencil out *before* remote notarization came along, and the mere invention of remote notarization didn't alter that calculus enough to change behavior.

In addition to the business incentive to overlook remote notarization, there is also the cultural matter that these large institutions are heavily populated by lawyers. We lawyers are trained to be risk averse. Every fiber of our intellectual being is attuned to risk and how to avoid it. The case method of teaching has instilled within us a bitter understanding that every good deed can be punished, that every opportunity can hide a disaster, and that any path but the most well-worn could lead into a jungle of misfortune. We are taught to litigate on the basis of precedent, hewing as closely as possible to things already decided. We scriven in the shadow of

[297] 15 U.S.C. § 7021.

litigation, choosing our strategies and our words by sailing as closely as possible to structures and phrasings already proven to work in the past. To us lawyers, anything new is dangerous. Is it any wonder that organizations teeming with lawyers had little interest in exploring the parameters of an emerging, untested method of obtaining a ministerial-but-critical component of a real estate document, when the tiniest of failures in that ministerial-but-critical component could cause the entire real estate transaction to be unwound in a subsequent dispute?

To be fair, the problem of the innovator's dilemma has ensnared many of the greatest enterprises that market economies have ever produced. As noted above, it is actually *good* management, and *good* corporate governance, that causes the innovator's dilemma to arise. And even if a business had been prescient enough to foresee the Pandemic, it is quite unlikely that they could have predicted what the Pandemic would do to real estate closings. As we admit above, it is easy to criticize with the benefit of hindsight. The point of our critique is that large real estate institutions are not the first to fall into the trap created by a disruptive technology.

In sum, even after its birth in Virginia in 2012, its maturity in Texas in 2017, and its spread across other states in the years leading up to the Pandemic, the concept of remote notarization remained largely that: a concept. Save for a few one-off transactions and experiments, real estate mainly carried on as it had for decades, beholden to paper processes and established means of doing business. Until all of that came to a screeching halt in March 2020.

V. THE PANDEMIC

Soothsayer: *"Beware the Ides of March."*
Caesar: *"He is a dreamer; let us leave him."*
--William Shakespeare, Julius Caesar [298]

[298] WILLIAM SHAKESPEARE, JULIUS CAESAR, Act I, Scene II, *available at* http://shakespeare.mit.edu/julius_caesar/full.html (last visited Aug. 30, 2020).

The novel coronavirus that became known as SARS-CoV-2 emerged in the Hubei province of China sometime in the late fall of 2019. On December 31, 2019, the World Health Organization received formal reports of a "pneumonia of unknown cause" in the city of Wuhan.[299] By January 9, 2020, experts had confirmed that the disease was caused by a never-before-seen coronavirus.[300] The first known death associated with the virus occurred on January 11, 2020.[301] The first known case in the United States was on January 20, 2020.[302] In a sign of the times to come, Chinese authorities locked down the entire 11-million person city of Wuhan on January 23, 2020.[303]

What came next was, as we all now know too well, social and economic disruption on a scale not seen since World War II. On March 15, the United States Center for Disease Control issued a recommendation that any gatherings be limited,[304] and the "lockdown era" began. One by one, state governors across the country issued "stay at home," "shelter in place," and similar executive orders that nearly brought U.S. economic activity to a standstill. The gross domestic product of the United States dropped by about five percent in the first quarter of 2020.[305] In the second quarter of 2020, the gross domestic product of the United States plummeted by an astonishing *one third*.[306]

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[299] World Health Organization, Timeline of WHO's Response to COVID-19, *available at* https://www.who.int/news-room/detail/29-06-2020-covidtimeline (last visited Aug. 30, 2020).
[300] *Id.*
[301] *Id.*
[302] A Timeline of the Coronavirus Pandemic, NEW YORK TIMES, *available at* https://www.nytimes.com/article/coronavirus-timeline.html (last visited July 23, 2020).
[303] *Id.*
[304] *Id.*
[305] *See* United States Dept. of Commerce, Bureau of Econ. Anal., News Release BEA 20-19, *available at* https://www.bea.gov/news/2020/gross-domestic-product-1st-quarter-2020-advance-estimate (last visited Aug. 30, 2020).
[306] *See* United States Dept. of Commerce, Bureau of Econ. Anal., News Release BEA 20-37, *available at* https://www.bea.gov/news/2020/gross-domestic-product-2nd-quarter-2020-advance-estimate-and-annual-update (last visited Aug. 30, 2020).

Ordered to stay at home by government authorities, and fearful of catching the deadly new disease that was spreading silently through the country, people began to wonder how they would close the real estate transactions that they had begun before the earth stood still. And suddenly, in a flash just as predicted by Christensen, the entire real estate world turned to the disruptive innovation that is RON. As we discuss below, the real estate supply chain was top-to-bottom unprepared for this wholesale change in the nature of notarization. The entire ocean of real estate transactions suddenly tried to squeeze through a garden hose. The bottleneck was insurmountable, and both market players and government officials attempted to find "workarounds" to enable real estate closings to occur. While laudable, these efforts were thrown together *in extremis* with no time for careful planning, and ultimately may have opened up even more unanswered questions that could someday return to haunt the transactions whose closure they facilitated.

A. Pipes Burst

Soon after the Ides of March, those of us who have been involved in remote notarization issues found our email and voicemail inboxes filling more rapidly than we could empty them. And our situation was nothing compared to that of the RON vendors. In early March of 2020, the RON marketplace largely consisted of a handful of vendors capable of operating at anything approximating scale. Their former drizzle of business turned into a monsoon in a matter of days. The vendors were no doubt attempting to expand their business, and as noted above, likely had designs on disintermediating and consolidating the entire nationwide notary business. But Amazon did not go from arcane bookseller to world-dominating "Everything Store" in a matter

of days.[307] And RON vendors could not go from scrappy tech startups to nationwide assembly line for the entire real estate marketplace in a matter of days, either.

The few seasoned and well-capitalized RON vendors were simply overwhelmed. Even those with high-level relationships at these vendors soon found that their calls and emails went unreturned. The authors are friends with an in-house lawyer at one of these startups, who confessed to us one day that she had only slept for four out of the last seventy-two hours. The situation was unsustainable.

This sudden emergence of a huge and untapped marketplace naturally began to attract new entrants, some of them well-meaning but ill-informed, and some of them perhaps less scrupulous. Our phones began to ring with questions of whether or not we had heard of one brand-new RON vendor or another. Internet searches often revealed that these vendors had no web presence at all, or were obviously newly-formed and hastily thrown together. The level of knowledge about how RON can and should be conducted in a safe and prudent manner was not inspiring. By late March of 2020, it was becoming increasingly obvious that the technology industry could not ramp up in a manner sufficient to meet the now-parabolic and ever-growing demand for RON.

Like a volcano, immense pressure was building for some way to conduct notarizations in a pandemic "social-distancing" situation. But this volcano was young, and the lava cone at its RON summit was too narrow to release all the pressure. The lava was going to find its way to the surface somewhere, even if not at the top of the volcano itself. The Kiluea eruption in Hawaii foreshadowed what was to come. Just as that eruption split the earth and started pouring out in an unexpected location, so also did the remote notary onslaught.

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[307] *See generally* BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON (2013).

The fissure opened in the then-epicenter of the pandemic: New York. With cases and deaths mounting by the day, Governor Andrew Cuomo issued an executive order on March 19, 2020 (the "Cuomo Order").[308] It invented from scratch a wholly-new brand of remote notarization that, for reasons discussed below, eventually became known as "remote ink notarization," or "RIN." The relevant language of the Cuomo Order was as follows:

> IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of Executive Order through April 18, 2020:
>
> Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:
>
> The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;
>
> The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing);
>
> The person must affirmatively represent that he or she is physically situated in the State of New York;
>
> The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
>
> The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
>
> The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.[309]

[308] N.Y. Exec. Order No. 202.7 (Mar. 19, 2020), *available at* https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency (last visited Aug. 30, 2020).
[309] *Id.*

The Cuomo Order was well-intentioned. People were dying, dozens by the day. There was no time for the niceties of deliberation. Unfortunately, the Cuomo Order was not drafted with a recognition of the significant legal challenges that remote notarization poses, all discussed in detail in the pages above. Accordingly, the Cuomo Order stumbled blindly into each of the three longstanding traps of remote notarization (the Location Question, the Authentication Question, and the Interstate Recognition Question). In addition, the Cuomo Order's novel process opened up a new legal issue we call the "Originality Problem." And finally, the Cuomo Order's reliance on executive powers to alter the legal processes governing notaries may also be subject to real uncertainty. We address each of these issues below.

1. The Location Question under the Cuomo Order

As discussed above, splitting the atom of notarization inevitably leads to the "where does it happen when it happens online?" problem, which we call the Location Question. The Location Question has proven metaphysically unanswerable, and the only stable public policy position that has been found in eight years of RON debates is to declare that the principal's location is irrelevant, but that the notary's location must be within the state of his or her licensure. This is the stable, consensus public policy that emerged from Texas and was later recodified into the model national acts. Whether intentionally or unintentionally, the Cuomo Order eschewed this consensus solution, turning it first on its head, and then into an affirmative representation. The Cuomo Order required that "[t]he [principal] must affirmatively declare that he or she is physically located in the State of New York."[310]

[310] *Id.*

There are a number of glaring problems with this approach to the Location Question. It seems likely that the drafters of the Cuomo Order were unaware that this approach had been extensively debated in other states several years before and was found to be unavailing. First, what are the legal consequences if the principal in fact *is not* where he or she represents or if the principal fails to make a representation at all?[311] Does that make the notarization void? Voidable? Or does failure to comply simply open the notary up to traditional negligence liability? (And what could possibly be the damages suffered if the notarial act is *not* void or voidable?) Or, perhaps, is the notary simply liable for sanctions for professional misconduct? Or is a factual inaccuracy on this point just irrelevant? Attempting to answer the Location Question by specifying a mandatory location for the principal opens up a need to specify what happens if the location is not as required. The Cuomo Order and its backdrop of existing New York notarial law provide no answers.

Second, if the legal consequences of failure to comply might result in the invalidity of the notarial act, how are third parties expected to mitigate their reliance risk? Notably, the Cuomo Order does not require the location of the principal to be disclosed in the notarial certificate—and there is no general requirement of disclosure that the notarization was performed remotely, as is required under the various model RON laws—so any failure to comply with the Cuomo Order would presumably be a "latent" defect in the certificate.[312] Although New York does have a curative provision that would (after six months) prevent challenges to a notarization on the

[311] It is notable that New York statutory law and case law does not provide the equivalent of the "modern" rule for the test of validity of a notarization as embodied in RULONA § 26, on which *see supra* n.144 and associated text.
[312] On the other hand, other substantive New York law requires any certificate of acknowledgment to state "all the matters required to be done, known, or proved on the taking of such acknowledgment." N.Y. REAL PROP. LAW § 306. Does this include the principal's representation of his or her location under the Cuomo Order? There is no clear answer.

basis of the *notary's* location[313] this provision does not cure any problems with the *principal's* location. In other words, the Cuomo Order theoretically makes every single notarization performed by a New York notary since March 19, 2020, potentially marred by a "hidden" or "latent" defect and subject to challenge. There is simply no way for a third party looking at a facially valid New York notarization to know for certain[314] whether it was performed under the Cuomo Order and thus potentially open to attack because the Order was not complied with. You can't even attempt to avoid the iceberg if it is completely submerged.

Finally, in the event of a challenge to a remote notarization, how is one supposed to prove that the location of the principal is what he or she represented it to be? People can lie, of course, and are especially likely to lie when they are interested parties to a transaction that involves large sums of money—as most real estate transactions do. All the known tools for an objective determination of location are unreliable. Internet protocol addresses can be tracked, but IP address tracking is easily duped by use of a virtual private network (VPN). This means that the only way to prove the principal's location is after-the-fact litigation and discovery. On the other hand, if the principal's *actual* location is irrelevant—because the Cuomo Order only requires the principal to make a *representation* about his or her location—there is still no simple way to prove what the principal might have said because there is no requirement for the remote notarization to be recorded. Any contest would likely become a case of "he said, she said" between the principal and the notary. Because there is no reliable method to "prove it" as a factual matter, the represent-your-location approach that the Cuomo Order deployed makes

[313] N.Y. EXEC. LAW § 142-a(2)(f) (curing "the fact that the action was taken outside the jurisdiction where the notary public or commissioner of deeds was authorized to act").
[314] Supplemental "best practice" guidance from the New York Department of State indicates that notaries using the Cuomo Order should "[i]ndicate on the document that the notarization was made pursuant to Executive Order 202.7." However, this is merely a best practice, not a requirement. New York Dept. of State, Guidance to Notaries Concerning Exec. Order 202.7, Mar. 31, 2020, *available at* https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf (last visited Aug. 30, 2020).

answering the legal consequences issue discussed in the paragraph above all the more important. If the representation has no legal consequences, what good does it do? And if the representation does have void or voidable-level legal consequences, the inability to prove without extensive litigation either the principal's location or what the principal might have said becomes a ticking time bomb awaiting challenge by anyone interested in sowing discord or attempting to avoid the implications of a real estate transaction.[315]

2. The Authentication Question under the Cuomo Order

As discussed above, a stable public policy consensus had developed under the model legislation that remote notarizations should be backed by multi-factor, third-party-validated forms of identity verification. The Cuomo Order's approach was none of the above. It merely required that the principal, "if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after."[316] While it is good that the Cuomo Order did not fall into the trap of permitting non-contemporaneous identification checks—an obvious yawning gap awaiting exploitation by fraudsters—the Cuomo Order's approach to authentication is weak and vulnerable to fraud. Again, the drafters of the

[315] Relatedly, who bears the burden of proving the signer's location, if there are legal consequences of an inaccurate representation? Under traditional notarial law, a party seeking to impeach a notarial certificate bears the burden of proof by clear and convincing evidence. *See*, *e.g.*, *Krueger v. Dorr*, 22 Ill.App.2d 513, 528, 161 N.E.2d 433, 440 (1959) (requiring "clear, convincing and satisfactory" proof by disinterested witnesses); *Murdock v. Nelms*, 212 Va. 639, 642, 186 S.E.2d 46, 49 (1972) (to impeach a certificate for non-appearance of the principal, "the burden rests upon the one alleging it" and "proof must be clear, cogent, satisfactory and convincing beyond reasonable controversy"); 91 AM. JUR. PROOF OF FACTS 3d 345, ACKNOWLEDGMENT OF REAL PROPERTY INSTRUMENTS AND OTHER ACKNOWLEDGMENTS § 12 ("To overcome the presumption that the recitals of fact in a certificate of acknowledgment that is proper on its face are true, the burden of proof is on the party asserting the invalidity of the acknowledgment. Clear and convincing evidence is generally required and a mere preponderance of the evidence is not usually sufficient to overcome the certificate."). However, under the Cuomo Order the principal's location is not a "fact" that is "recited" in the certificate.

[316] N.Y. Exec. Order No. 202.7.

Cuomo Order appear not to have known that their chosen approach had been debated several years earlier and was found wanting.

Essentially, the Cuomo Order requires little more in the way of authentication than for the principal to hold his or her driver's license up to the webcam. This is precisely what the proponents of the Virginia statute promised would never happen.[317] To say that this is a system vulnerable to fraud is an understatement. In the pre-Pandemic era, any bar bouncer who did not physically examine a driver's license of a thirsty youth (probably with a black light to check for security holograms) would be fired for failing to use even basic means to check the bona-fides of the ID. The reason is that anyone with access to a decent color printer and photo-editing software can create a compelling-looking fake ID. It was for this very reason that the landmark Texas legislation required "credential analysis" using high-resolution images to check the offered ID for security-feature bona fides, creating a high-tech and far-superior version of the "bar bouncer with a black light" discussed above. And further, recognizing that even the best software might be fooled by a skillfully produced fake ID, the landmark Texas legislation required an *additional* form of "identity proofing" that would make it doubly difficult for any fraudster to pass through the screening. While certainly no system can ever be made fraud-proof, the landmark Texas legislation and the model laws based upon it were highly fraud-resistant.

By eschewing these established approaches, the Cuomo Order took a path that is unfortunately fraud-prone. Time will tell whether fraudsters were able to take advantage of the Cuomo Order. The longer the Cuomo Order (or any similar order like it in other states) persists without the anti-fraud protocol contained in model RON legislation, the greater the fraud risk becomes.

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[317] *Supra* n.111 and associated text.

3. The Interstate Recognition Question under the Cuomo Order

As discussed in detail above, the most logical solution to the Interstate Recognition Question is to make sure that the subject matter of the notarized document exclusively affects the interests of the same state that commissioned the RON notary. This was the "Texas nexus" proposal. However, as discussed above, that solution has proven to be politically unpalatable. This has left silence as the only consensus public policy answer to the Interstate Recognition Question. The Cuomo Order appears to be silent on interstate recognition. But unfortunately, the silence here is far from golden.

Recall from the discussion above that the Interstate Recognition Question is inextricably bound up with the Location Question. Although the Cuomo Order does not explicitly say anything about whether a New York notarization performed under this novel procedure can cross state lines, insofar as the Cuomo Order requires that the notary's principal make a representation of being physically present in New York, the Cuomo Order can be read to imply that such emergency notarizations are meant for New York subject matter only.[318] And furthermore, although no state statute out there explicitly answers the Interstate Recognition Question, as we discuss above, at least in those states that have passed some type of remote notarization law based on any of the model acts, there are several sensible arguments in favor of recognition based both on uniform statutory text and mutually approved public policies that generate similar end-result practices. After all, if two states pass remote notarization laws based on the same basic set of compromise principles, should not the end results be interoperable?

[318] One can certainly also argue that the Cuomo Order's silence allows its emergency notarizations to cross state lines. The point is that it's arguable.

But at the time the Cuomo Order was drafted, not a single state had any analogue to the novel emergency procedure that the Cuomo Order created.[319] Indeed, as we discuss below, the "paper passing" procedure created by the Cuomo Order was entirely *sui generis*, with neither legal nor practice-based analogues to any other state. To the extent that any emergency notarizations performed under the Cuomo Order were done on documents affecting real property in states other than New York, it remains to be seen whether courts in those sister states will recognize those emergency notarizations.

4. The originality problem

We introduced this paper with Jean Baudrillard's point about the "simulacrum," the copy without an original. While Baudrillard's point may be a bit overwrought when it comes to society as a whole, the inability to distinguish between the "original, real" document and its "copy" is spot-on for the subject at hand. Indeed, the simulacrum problem is endemic in all things relating to electronic closings.[320]

The law, and especially the law surrounding real estate documents, remains intellectually wedded to the concept of an "original." In the common parlance of real estate practice, signature pages are "originals" only when they are signed in wet ink, even though the statutory law has obviated that rule of thumb for at least twenty years.[321] Continuing to operate with this paper-based mental model, transaction parties and their attorneys often wait until wet-ink "originals" are in possession of a trusted third party before authorizing the release of funds or the transfer / encumbrance of title. County recorders often demand that only "originals" be recorded, whether

[319] Other states have subsequently engaged in executive actions, as we discuss below.
[320] This subject could be an entire paper by itself, especially as regards the issues surrounding promissory notes.
[321] Uniform Electronic Transactions Act §§ 7 and 11; 15 U.S.C. §§ 7001(a) and (g).

or not a legal requirement exists to that effect. Few stop to consider whether the electronic documents already in their possession might legally be "originals" already.

This was all difficult enough before the Pandemic. Unfortunately, the Cuomo Order adds fuel to that fire. It creates a system whereby the notary can end up notarizing *two* versions of the same document, one a faxed or scanned "copy" and one a wet-ink "original." It is for this reason that the procedure created by the Cuomo Order became known as "remote ink-signed notarization," or "RIN." The idea was essentially to make sure that there was a "paper original" of the notarized document. The Cuomo Order states in relevant part:

> The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
>
> The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
>
> The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.[322]

But with both documents now notarized by a notary's ink signature, which one is now the "original"? If the answer is "both," how do we square this result with the fact that the principal only signed one document and not counterparts? And if the electronically transmitted and printed document which is then signed in wet ink by the notary is an "original" under the law, how are third parties supposed to distinguish it from a (potentially invalid) notarization performed outside the Cuomo Order on a photocopy of a signed document?

In fact, could there be three or more legal "originals"? If the notary receives the signed document via fax or email, prints it, and performs a notarization with a wet-ink signature, and then re-faxes or emails a scanned version back to the principal, then this is technically a form of

[322] N.Y. Exec. Order No. 202.7.

"electronic notarization"; it is a notarial act performed with respect to an "electronic record"[323] that has simply been reproduced—at the point the notary signs and seals it—in tangible form. Yet, it appears that the Cuomo Order envisions the faxed/emailed version received by the principal from the notary to "count" as an original too. Even though the Order requires the principal to send such a "notarized copy" to the notary along with the "original signed document," this of course only means that the principal has to print off the faxed/emailed version received from the notary. In turn, this means there are at least three versions of the notarized document that are legally "originals": one that is only in electronic form (what the principal received via fax/email) or looks like a photocopy (however many copies the principal prints off); one where the principal's signature is electronic but the notary's is wet ink; and one where both the principal's and notary's signatures are in wet ink. If you are confused by the permutations, you are not alone.

Other problems abound. It was mentioned above that the Cuomo Order's requirement for the notary to ink-sign a document received via fax or email is technically an "electronic" notarization. However, unlike other state electronic notarization laws the Cuomo Order does not require the document to be tamper-sealed when the notary re-converts the wet-ink notarized tangible document back into electronic form.[324] In other words, this is poor public policy—permitting potentially countless copies of non-tamper-sealed electronic notarizations that all

[323] *See* the definition of "electronic record" in the Uniform Electronic Transactions Act § 2(7) ("a record created, generated, *sent*, *communicated*, *received*, or stored by electronic means" (emphasis added)); and the federal E-SIGN Act, 15 U.S.C. § 7006(4) (similar definition).

[324] *See*, *e.g.*, Revised Uniform Law on Notarial Acts § 20(a) (2018) (notary required to "select one or more tamper-evident technologies to perform notarial acts *with respect to electronic records*" (emphasis added)). *See also* the official commentary in *id.* cmt. ("Any technology that the notary selects must be a tamper evident technology."). A state with an electronic notarization law like RULONA could not adopt a New York-style emergency order without confusion as to whether the notary must find a way to make the re-scanned notarized document tamper evident. In reality, such an order would likely lead its notaries simply to violate the tamper-seal requirement. One could argue that any tamper-seal requirement would have been *implicitly* suspended by the emergency order, but again, the point is that it's arguable.

count as "originals" without the ability of third parties to detect changes or modifications to the document post-notarization. In addition, if the notary "repeat[s]" a notarization on a tangible document received from the principal up to thirty days later, then this presumably requires the notary to back-date the certificate to the date the acknowledgment was actually taken—resulting either in a non-contemporaneous completion of the certificate[325] or, even worse, a false and thus impeachable certificate. (That is because it is not entirely clear what it means to "repeat" a notarization: must the entire notarial act and oral communication with the principal be repeated or just filling out the notarial certificate?)

The idea of RIN is thus unfortunately prone to collapse upon itself. It adds even more questions to an already-unstable stack. These additional issues stand to become another nitpicking ground for litigation when Pandemic-era real estate transactions are second-guessed in distress situations. The Cuomo Order does not provide answers to these questions.[326] But in fairness, any answer it would seek to provide would likely be unsatisfactory, because how can a governor "decree" an answer to an area of substantive law? That brings us to the final novel legal issue that the Cuomo Order unearthed: the question of how far a governor's "emergency powers" can reach.

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[325] Which could violate state notarial common law and certainly does violate the contemporaneous certificate requirement of RULONA. *See* Revised Uniform Law on Notarial Acts § 15(a)(1) (2018). There is some old case law suggesting that a certificate of acknowledgment need not immediately follow the taking of the acknowledgment provided the rights of intervening third parties are not affected. 1 CORP. JUR., ACKNOWLEDGMENTS § 157. Under New York law, it is not clear if an acknowledgment must always be taken and the certificate completed contemporaneously with the execution of the document. *Matisoff v. Dobi*, 659 N.Y.S.2d 209, 214, 681 N.E.2d 376, 381 (1997) (because New York statutes "do not specify when the requisite acknowledgment must be made . . . [i]t is therefore unclear whether acknowledgment must be made contemporaneous with the signing of the agreement.").

[326] *See also* Guidance to Notaries Concerning Executive Order 202.7, *supra* n.314 (providing some additional guidance to New York notaries operating under the Cuomo Order, but in the authors' view, not providing real certainty on the core questions).

5. The limits of executive powers

Since the founding of the Republic, few topics have generated more interest from political theoreticians than the nature and extent of the executive power. This line of discourse has tended to focus on the American Presidency, which wraps the subject up in a tantalizing one-liner: "The executive Power shall be vested in a President of the United States of America."[327] Treatises have been written and careers have been made debating the nature and extent of "the executive Power."[328] Depending on which of the Framers one finds more influential, the American President was either meant to be an "energetic" executive only a few notches below a king,[329] or Congress's errand-runner whose position was merely to dutifully implement whatever the legislature ordered up.[330] But often forgotten in the focus over the federal executive power is the fact that the states have governors, and those governors have a residuum of "executive power" all their own. The Cuomo Order, and the host of copycat orders that followed it, raises curious questions about the authority by which a governor can alter the law respecting notaries.[331]

The Cuomo Order cites to Section 29-a of Article 2-B of the New York Executive Law.[332] As it reads at the time of this writing, that provision states in relevant part:

> Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend any statute,

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[327] U.S. CONST., ART. II, § 1, cl. 1.
[328] *See generally, e.g.*, ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).
[329] *See, e.g.*, THE FEDERALIST NO. 70, at 387 (Alexander Hamilton) (Barnes & Noble Classics 2006) ("Energy in the executive is a leading character in the definition of good government.").
[330] *See, e.g.*, Gerhard Caspar, *Executive-Congressional Separation of Powers During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473, 476 (1995) ("Jefferson and Galltin favored legislative over executive power."); *id*. at 497 ("'Mr.' Jefferson did indeed, as a president should, think of himself as an agent rather than a principal.").
[331] *See, e.g.*, Dale A. Whitman, *COVID-19 and Real Estate*, 34 PROBATE & PROPERTY 28, 32 (July/Aug. 2020) ("[S]everal of these orders appears to be beyond the authority of the governors issuing them, raising a dilemma for lenders and title insurers as to whether to accept them at face value or to wait for action from their state legislatures.").
[332] N.Y. Exec. Order No. 202.7.

> local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster. The governor, by executive order, may issue any directive during a state disaster emergency . . . . Any such directive must be necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive.

The statute goes on to place certain limits on the governor's powers to make either "suspensions" or "directives." In relevant part, these include:

> [T]he order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions;
>
> [A]ny such suspension order or directive shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary . . . .[333]

Let us examine the Cuomo Order carefully in light of the language of the statute. The statute provides for two types of gubernatorial emergency actions: one a "suspension," and the other a "directive." The "directive" portion was added to the executive law after the onset of the Pandemic, but since it exists today and the Cuomo Order continues in force as of this writing, it is worth examining.

We start with "suspensions." The statute allows the governor to "temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, *of any agency*."[334] The emphasized text is important. It is rather a stretch to say that notaries and their practices are a state "agency." In New York, notaries are commissioned by the Secretary of State, who does operate a state agency (the Department of State), but the Cuomo Order does not "suspend" the means by which notaries get their commissions from the Department of State. Rather, the Cuomo

[333] *Id.*
[334] *Id.* (emphasis added).

Order changes the way that notaries perform notarial acts, which is a matter of underlying statutory law,[335] not state bureaucratic procedure.

It can be argued that the phrase "of any state agency" only modifies the phrase "orders, rules or regulations," and that the first part of the statute allows the governor to suspend any "statute," in whole or in part, as the governor may choose. Notaries operate under a statute,[336] and so the argument goes, the governor can "suspend" parts of it, and then "alter" or "modify" the statute as he or she may choose.

Perhaps that is true, but if so, it only changes the question: surely there must be *some* limit to this power. Taken all the way to its logical end, if a governor could "suspend," "alter," or "modify" any statute at will, the governor would have absolute power to rule by diktat during a declared emergency. And to this end, the statute provides that any alteration or modification must be the "minimum deviation" necessary. Is rewriting the underlying substantive law of notarial practice by gubernatorial fiat the "minimum deviation" needed for the circumstances? Perhaps, as the Pandemic has certainly changed the world. But there is no way to gain a definitive answer to that question other than court rulings in litigation.

A similar analysis occurs with respect to "directives." Definitionally, a "directive" is "an authoritative order or instrument issued by a high-level body or official."[337] It implies an imperative, a mandate that a person shall do (or shall not do) a thing. As far as this paper is concerned with notarizations, the Cuomo Order does not *direct* anyone to perform, or cease to perform, any notarial act. Instead, it *authorizes* a means of performing notarizations that is not

[335] N.Y. EXEC. LAW § 135 et seq.
[336] *Id.*
[337] Directive, https://www.merriam-webster.com/dictionary/directive (last visited Aug. 30, 2020).

contained in the underlying statutory law. To say that the Cuomo Order fits under the "directive" portion of the emergency powers statute is also rather a stretch.

Finally, there is also the question of "inherent executive powers." When the several states broke from the English Crown, they inherited the sovereign powers that had formerly belonged to the Crown. Some of those powers were ceded to the new federal government in the creation of the Constitution, but the balance of them were reserved.[338] It is arguable that this inherent reserve of powers enables the state governors to act unilaterally for the benefit of the populace during a time when the legislatures cannot feasibly meet, and that this reserve of "inherent executive power" authorizes the governor to alter the underlying substantive statutory law of notarizations without the need to rely on the emergency powers statute at all. Whatever may be the extent of "inherent executive power," it is another question that cannot be answered but for rulings by the courts.

6. Dominoes fall

The release of the Cuomo Order in late March 2020 touched off a nationwide spate of similar actions by governors in other states. Between March and June of 2020, governors or other authoritative officials in approximately half the states issued some type of emergency order affecting notarizations.[339] These orders often created new twists on the "RIN" concept that originated in the Cuomo Order, and most of them thus inherited the Cuomo Order's flaws. This is not the place to examine each of these orders in detail, but it is fair to say as a general matter

[338] U.S. CONST., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
[339] *See, e.g.*, Am. Land Title Assoc., Digital Closings, https://www.alta.org/advocacy/online-notarization.cfm (collecting sources) (last visited Aug. 30, 2020).

that they deal with the various issues discussed above in various ways, some of them more effectively than others. Two points merit further elaboration here.

First, the legal confines of some of these executive orders have been or are being challenged as we write this paper. For example, a case pertaining to the scope of the emergency powers granted to the Governor of Michigan is currently winding its way through the courts of that state.[340] And the Wisconsin Supreme Court has already struck down an emergency order issued by that state's public health officials.[341] These cases all involve subjects far weightier than notarizations.[342] But the decisions that courts render on these novel exercises of emergency executive powers could affect the validity of notarizations performed under the auspices of those emergency powers. For example, if an executive emergency order is struck down as *ultra vires*, what becomes of notarizations that occurred under that emergency order while it was in effect? Further, aside from the collateral consequences of complex constitutional litigation arising out of alleged gubernatorial infringements on fundamental rights, something as mundane as a foreclosure challenge or a bankruptcy could result in the validity of emergency-powers notarizations being tested in one state or another. As we write this paper, the economic outlook is uncertain, but the probability of more foreclosures and bankruptcies seems high.

Second, it is fair to say that the quality of emergency orders regarding notarizations improved as time passed. The Cuomo Order was the first of its kind, and by the time that other states were crafting their own emergency executive orders, policymakers had started to look

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[340] *See House of Reps. v. Governor*, 943 N.W.2d 365 (Mich. 2020) (denying petition for expedited review by the Michigan Supreme Court and instead requiring the ordinary appellate process to play out).
[341] *Wisconsin Legislature v. Palm*, No. 2020AP765-OA (Wisc. May 13, 2020) (holding that a public health official's "stay at home" order exceeded her legal authority), *available at* https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=260868 (last visited Aug. 30, 2020).
[342] *See, e.g., Michigan Dept. of Heath & Human Servs. v. Manke*, 2020 Mich. App. LEXIS 3591 (Mich. Ct. App. May 28, 2020) (illustrating arguments about significant constitutional issues that arise from governor's order closing a barbershop business); *on appeal at House of Reps. v. Governor*, 943 N.W. 2d at 365.

more and more to the principles behind model RON legislation.[343] The needs of those in the real estate marketplace do not reset at the crossing of each state border, and by the start of the summer of 2020, it was becoming clear that uniformity and shared principles were sorely needed. Some began to speak of uniform federal standards for the various types of remote notarization—the final subject to which we turn in the pages below.

7. A humble warning

We recognize that in this section above we are criticizing the actions of well-meaning government officials who were doing their level best to address a situation that has no precedent in the last century at least. We do not mean to be unfair to those governors and other officials who were only seeking to address emergency needs, without the ability to fully deliberate on their actions. We cast no aspersions on the bona fides of anyone involved in creating any of the emergency orders discussed above. We have no doubt that they all did the best that they could with what they had available at the time.

But all that being said, it is important to recognize that these emergency orders and the concept of "RIN" that they created suffer from *significant* flaws. These are not permanent, or even semi-permanent, solutions to the challenge of remote notarization. Continuing to indefinitely extend these emergency orders—or even worse, enshrining in statute the shortcut, workaround procedures they temporarily authorize—will only offer more opportunities for both fraudulent real estate transactions and retrospective gadfly attacks on legitimate real estate transactions that close under the auspices of these emergency orders. To truly address the legal

[343] It is also worth noting that the Mortgage Bankers Association (MBA), National Association of Realtors (NAR), and American Land Title Association (ALTA) have jointly published a model executive order for governors to follow that resolves many of the more glaring problems in the various states' emergency orders. *See* Am. Land Title Assoc., Digital Closings, *supra* n.339.

challenges that have arisen from splitting the atom of notarization, policymakers need to pass strong, uniform laws that are based on the principles contained in the model acts. Uniformity across all 50 states may be hard to come by absent a federal solution.

B. The Proposed SECURE Notarization Act

Shortly after the lockdown era began, on March 18, 2020, Senators Kevin Cramer (R-N.D.) and Mark Warner (D-Va.) introduced Senate Bill 3533, the federal "Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020," which we refer to below as the "SECURE Notarization Act."[344] The bill recites as its intended purposes:

> To authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce, to require any Federal court located in a State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce, and to require any State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce or when the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public was commissioned.[345]

In short, the SECURE Notarization Act would resolve each of the unanswered questions surrounding remote notarization, bringing much-needed clarity to this area of the law. It would also dramatically increase the availability of remote notarizations for all consumers in the U.S. by enabling any consumer to connect with any notary who wants to provide remote notarization services. These goals are met through a three-pronged approach.

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[344] *Sens. Cramer, Warner Introduce Bipartisan Legislation to Allow Remote Online Notarizations Nationwide* (press release March 18, 2020), *available at* https://www.cramer.senate.gov/news/press-releases/sens-cramer-warner-introduce-bipartisan-legislation-allow-remote-online-notarizations-nationwide (last visited Aug. 30, 2020); *also available at* https://www.warner.senate.gov/public/index.cfm/2020/3/sens-cramer-warner-introduce-bipartisan-legislation-to-allow-remote-online-notarizations-nationwide (last visited Aug. 30, 2020).

[345] S. 3553, 116th Cong. (2020), *available at* https://www.congress.gov/bill/116th-congress/senate-bill/3533/text (last visited Aug. 30, 2020) (hereinafter "SECURE Act").

First, the SECURE Notarization Act would authorize any notary in the country to perform remote notarizations for U.S. consumers and transactions.[346] Of course, many states that have passed remote notarization laws require notaries to provide some sort of registration or notification to the state commissioning official first, so to the extent that a state has imposed such a condition the state law requirement would not be displaced.[347] Otherwise, any commissioned notary public in the U.S. would enjoy remote notarization authority.

Second, the SECURE Notarization Act would create national minimum standards for performing remote notarizations. In particular, it effectively settles the Authentication Question by leveraging the RULONA 2018 framework for authentication, mandating use of at least two distinct types of third-party validated authentication processes whenever a notary was acting with a remote principal.[348]

Finally, the SECURE Notarization Act would resolve both the Location Question and the Interstate Recognition Question in one fell swoop. Drawing on the full extent of Congress's powers under both the Commerce Clause and the Full Faith and Credit Clause, the SECURE Notarization Act would have effectively required each federal court and each state to recognize any notarization done by any notary commissioned by any of the United States.[349] Notably, the term "State" includes all political subdivisions of a state or U.S. territory and any office or

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[346] That is, the SECURE Act includes a "nexus" requirement in the form of the "overseas signer rule" in RULONA 2018. If the signer is not physically located in the U.S. then the transaction or document must have some underlying connection, such as for use in a domestic public office or because it relates to property located in or a transaction substantially connected to the United States. *See* SECURE Act § 4(a)(3).

[347] SECURE Act § 10(d) (not permitting remote notarizations if a state requires a special commission or authorization).

[348] *Compare* SECURE Act § 4(a)(2) (permitting authentication by "not fewer than 2 distinct types of processes or services through which a third person provides a means to verify the identity of the individual through a review of public or private data sources") *with* Revised Uniform Law on Notarial Acts § 14A(c)(1)(C) (2018) (permitting remote notarization if the notary "has obtained satisfactory evidence of the identity of the remotely located individual by using at least two different types of identity proofing"). RULONA defines "identity proofing" as "a process or service by which a third person provides a notary public with a means to verify the identity of a remotely located individual by a review of personal information from public or private data sources". *Id.* at § 14A(a)(3).

[349] SECURE Act §§ 6 & 7.

agency of those political subdivisions, including county recorders.[350] (In addition, because the SECURE Notarization Act would grant *federal authority* to perform remote notarizations, any state whose comity statute recognizes notarial acts performed under federal law would directly recognize remote notarizations on that basis as a matter of state law.[351]) By setting minimum safety standards for authentication and then providing for full interoperability of all notarizations throughout the nation, the SECURE Notarization Act would have made the Location Question irrelevant by providing a conclusive answer to the Interstate Recognition Question, without inadvertently fostering a "race to the bottom" in authentication standards.[352]

Importantly, to achieve these goals the SECURE Notarization Act would preempt any inconsistent state law. Drawing on the approach taken by the federal E-SIGN Act twenty years before,[353] the SECURE Notarization Act would grant safe harbor to any state law that is an enactment of RULONA 2018, or any similar law (such as those inspired by the MBA-ALTA model) that is consistent with the minimum authentication standards written into the SECURE Notarization Act.[354] Beyond that, any inconsistent state law would have to bow. In short, the

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[350] SECURE Act § 2(8)(B) (defining "State" to include "any executive, legislative, or judicial agency, court, department, board, office, clerk, recorder, register, commission, authority, institution, instrumentality, county, municipality, or other political subdivision").

[351] For example, *see* Uniform Law on Notarial Acts § 5(a) (recognizing notarial acts "performed anywhere by any of the following persons under authority granted by law of the United States: . . . any other person authorized by federal law to perform notarial acts"); and Revised Uniform Law on Notarial Acts § 13 (2018) (recognizing any "notarial act performed under federal law . . . if the act performed under federal law is performed by . . . any other individual authorized by federal law to perform the notarial act").

[352] For this reason, the SECURE Act does not contain a "disclosure" requirement as contained in the various model RON laws. Disclosure becomes irrelevant if remote notarizations from any state's notaries are assured nationwide validity and recognition.

[353] 15 U.S.C. § 7002. On this non-preemption provision, *see* 1 RAYMOND T. NIMMER & HOLLY K. TOWLE, THE LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS § 4.09 (LexisNexis A.S. Pratt).

[354] SECURE Act § 9. A notable distinction between the SECURE Act's non-preemption provision and the E-SIGN Act's parallel provision is that the latter law requires state statutes to make a "specific reference" to the federal law to avoid preemption. 15 U.S.C. § 7002(a)(2)(B). In practice, this has proven to be a large burden with very few benefits to courts construing state electronic transaction laws. For example, nearly every uniform law adopted by the Uniform Law Commission since 2000 has a standard boilerplate non-preemption provision (*e.g.*, RULONA § 31), which means that states wind up codifying the same boilerplate dozens of times for each specific uniform law they enact. In practice, however, there are hundreds of additional or non-uniform state statutes permitting electronic

SECURE Notarization Act would have brought clarity, certainty, and consistency to the present cacophony that is the remote notarization legal landscape.

Alas, as we finish this paper near the end of August 2020, the SECURE Notarization Act has not moved out of the Senate Judiciary Committee. Given the current stalemate in Washington and the proximity of the general election, even a nonpartisan bill that seeks only to prevent legal confusion has so far been unable to find its way. Perhaps the SECURE Notarization Act will find its time in a more cooperative future. Until then, the challenges of remote notarization will continue to immiserate.

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> *"We are in the era of events without consequences (and of theories without consequences)."*
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> *--Jean Baudrillard* [355]

Six months into the Pandemic, the real estate market has become much like America itself: a landscape stratified into big winners and big losers, with little to be found in between. Residential transactions in the suburbs around major cities are going gangbusters, as employed white-collar workers seek out bigger places of residence to account for the fact that the home is now also the home office, home school, home gym, and so on.[356] Residential lenders are inundated with refinance transactions, as federal government interest rate policies drive 30-year

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signatures or documents where state legislators did not remember to insert the required reference. The literal effect of this failure is that the federal E-SIGN Act preempts these countless state laws—technically creating federal subject matter jurisdiction over any dispute involving an electronic signature or document under them—even if these state laws are completely "consistent" with E-SIGN. *Id.* at § 7002(a)(2)(A)(i). In retrospect, this "specific reference" provision was a poor public policy choice.

[355] BAUDRILLARD, *supra* n.1, at 164.

[356] *See, e.g.*, Dima Williams, *A Booming Housing Market: Real Estate in These Cities is Quickly Recovering*, FORBES, May 29, 2020, *available at* https://www.forbes.com/sites/dimawilliams/2020/05/29/a-booming-housing-market-real-estate-recovering/#75418f8a1dbb (last visited Aug. 30, 2020).

fixed mortgages into the 2.XX% range.[357] Meanwhile, the commercial marketplace looks dark: Hotels and retail properties struggle for life.[358] Multifamily residential owners wonder whether their tenant base can pay this month's rent—and how they'll pay their mortgage lender if rents don't materialize.[359] Office owners wonder whether the "work from home" revolution will last forever, and how they'll survive if so.[360]

Whether commercial or residential in nature, those transactions that are closing are getting notarizations done *somehow*. How exactly are they doing it? Your authors have heard of "drive-by closings," "outdoor closings," "drive-through closings," "plexiglass closings," and a whole host of other workarounds . . . in addition to remote notarization closings. With this variety of options to deploy besides remote notarization, all of the legal issues we discuss in this paper may therefore at this moment seem like theories without consequences.

But there are two reasons not to take this tack. First, exactly how many remote notarizations are occurring in real estate transactions is a mystery that no one can fully answer at this moment. The number could be quite small, or it could be much larger than anticipated. And second, the digitization of real estate is a secular trend that is not going away. All of society is becoming more and more digital. The likelihood that things will just "go back to normal" after the Pandemic was already slim, and it grows ever slimmer with each passing day of "social

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[357] *See, e.g.*, Natalie Campisi, *Mortgage Rates Plunge to Record Lows, But is the Refinancing Boom Ending?*, FORBES, Aug. 6, 2020, *available at* https://www.forbes.com/advisor/mortgages/mortgage-rates-plunge-record-lows/ (last visited Aug. 30, 2020).

[358] *See, e.g.*, Keith Larsen, *Submerged in Securities: Many CMBS Hospitality Loans May Be Underwater Soon*, THE REAL DEAL, June 12, 2020, available at https://therealdeal.com/2020/06/12/submerged-in-securities-many-cmbs-hospitality-loans-may-be-underwater-soon/ (last visited Aug. 30, 2020).

[359] *See, e.g.,* Georgia Kromrei, *Cracks Starting to Show in U.S. Multifamily Markets*, THE REAL DEAL, Apr. 27, 2020, available at https://therealdeal.com/2020/04/27/cracks-starting-to-show-in-u-s-multifamily-markets-due-to-covid-19/ (last visited Aug. 30, 2020).

[360] *See, e.g.,* Roger Vincent, *Office Leasing in L.A. Falls to Lowest Level Since Great Recession*, LOS ANGELES TIMES, July 8, 2020, *available at* https://www.latimes.com/business/story/2020-07-08/coronavirus-commercial-real-estate-los-angeles (last visited Aug. 30, 2020).

distancing." The real estate economy was already being driven towards becoming "touchless," before touching others became a risk to one's life.

For remote notaries and their technology vendors, the notarization itself is the finish line. Once they complete their duties, they exit the stage and move on with their lives. But we real estate lawyers must be concerned about how transactions will hold up over time. To us, the notarization is the starting line, not the finish line. We should be thinking ahead to how remote notarizations will hold up under the crucible of a bankruptcy challenge or a foreclosure challenge. As we have laid out in detail in this paper, many unanswered questions remain about remote notarizations, and the sensible thing to do would be to answer them legislatively. There are well-reasoned answers to be found, if legislators both state and federal are willing to take them up: RULONA 2018 and the MBA-ALTA Model Legislation are strong foundations for state-level action, and the federal SECURE Notarization Act would end the debates once and for all.

One thing is for certain: the radioactive public policy issues unleashed by splitting the atom of notarization will not simply disappear, much as we might hope that they will. If legislatures fail to provide answers to these questions, then the courts will be forced to do so. That's exactly what happened after the Great Recession, and although the major legal-economic structures of the real estate economy were largely vindicated, countless resources were wasted through duplicative lawsuits filed across the country alleging sundry forms of paperwork sins. It would be best if we didn't have to do that again this time around, as we may not like what the courts may find.

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